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No. 87-2093

IN THE

Supreme Court of the United States

October Term, 1987

INDIANA HOSPITAL, *et al.*,

Petitioners,

vs.

RALPH J. MILLER, M.D.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

I. Whether a physician may avoid a summary judgment dismissing his antitrust claim for revocation of his hospital staff privileges where his state-mandated revocation hearing complied with due process of law and a finding of professional incompetence was supported by substantial evidence.

II. Whether a physician whose hospital staff privileges have been revoked may recover treble damages in his antitrust action even if the fact finder determines that he is professionally incompetent.

List of Parties and Rule 28.1 List

The parties to the proceedings below were Petitioners Indiana Hospital; Henry F. Hild; Donald F. Smith; William R. McMillen; John S. Simpson; Thomas S. Barbor; Samuel W. Jack, Jr.; Mrs. C. Fred Hildebrand; Mrs. Wanda M. Weyandt; Harry C. McCreary; C. Wilmer Johnston; George M. Evans; Donald S. Brody; Roger J. Reschini; Joseph Kovalchick; William G. Evans, M.D.; Melvin C. Williams, M.D.; Robert G. Goldstrohm, M.D.; David C. Hughes, M.D.; Ralph F. Waldo, M.D.; Herbert L. Hanna, M.D.; Richard N. Freda, M.D.; Frank Weiner, M.D.; Henry Mitchell, M.D.; Ralph R. Brown, M.D.; and the Respondent, Ralph J. Miller, M.D.

The parties before this Court are the same as those below.

Petitioner Indiana Hospital, a corporation, is a subsidiary of Indiana Healthcare Corporation. Indiana Healthcare Corporation also has as subsidiaries Indiana Health Care Foundation and Indiana Hospital Properties, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Indiana Hospital, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on March 31, 1988.

Opinions Below

The Opinion of the Court of Appeals for the Third Circuit is reported at 843 F.2d 139, and is reprinted in the appendix hereto, p. 1a, *infra*., along with the Judgment.

The February 10, 1986 Opinion and Order of the United States District Court for the Western District of Pennsylvania (Simmons, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 32a, *infra*. The Western District's Opinion and Order of May 6, 1987 (Simmons, D.J.), is reported at 660 F. Supp. 250, and is reprinted in the appendix hereto, p. 20a, *infra*.

Also included in the appendix is the Third Circuit's Order denying petition for rehearing, p. 19a, *infra*., and order staying the issuance of certified judgment, p. 18a, *infra*. Additionally, the appendix contains the decision of the Pennsylvania Superior Court, p. 46a, *infra*., which is also reported at 277 Pa. Super. 370, 419 A.2d 1191 (1980), the unreported decision of the Indiana County Court of Common Pleas (Handler, P.J.), p. 59a, *infra*., and the Hearing Committee's Report, p. 77a, *infra*.

Jurisdiction

The jurisdiction of the district court was invoked under 28 U.S.C. §1331, federal question, and 28 U.S.C. §1343, civil rights and elective franchise (dismissed and not appealed).

On May 6, 1987, the Western District granted Petitioners' Motion for Summary Judgment and entered an order dismissing the case. See p. 20a, *infra*.

On Respondent's appeal, the Third Circuit on March 31, 1988, entered a judgment and an opinion reversing the Western District's order and remanding the case for further proceedings. See p. 1a, *infra*.

On April 22, 1988, the Third Circuit denied Petitioners' peition for rehearing *in banc*. See p. 19a, *infra*.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

Statute Involved

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; penalty (July 2, 1890, 26 Stat. 209, as amended)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Statement of the Case

Respondent Ralph J. Miller is a practicing physician and Board certified urologist. He was admitted to full Senior Staff privileges at Petitioner Indiana Hospital in 1958.

On July 2, 1981, Dr. Miller initiated this action by filing a multi-count complaint, including an antitrust claim pursuant to 15 U.S.C. §1, due to the revocation of his staff privileges on October 14, 1977. None of the other counts in Dr. Miller's Complaint are included in this petition.[1]

On February 16, 1977, Joseph White died of an acute circulatory arrest at 8:40 p.m. while a patient at Petitioner Indiana Hospital, located in Indiana, Pennsylvania. He had been admitted through the Hospital's emergency room suffering from acute pneumonitis and hematuria on February 13, 1977, and was cared for while at the Hospital by Respondent Dr. Ralph J. Miller. Later a Hospital Hearing Committee was to find, among other deficiencies, that "Dr. Miller failed to request a medical consultation to assist with and/or to take over the management of the treatment of Hospital patient, Joseph P. White (#320,120), under circumstances which should have clearly indicated to Dr. Miller the need for such a consultation," and that "Dr. Miller failed to order, or to timely order, various standard, routine and necessary examinations, testings and laboratory work incidental and necessary for proper medical management of patient Joseph P. White's respiratory condition" (pp. 80a-81a, *infra.*).

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[1] Respondent also alleged a claim under §2 of the Sherman Act. The Third Circuit did not reach the §2 claim, *see*, n.8, 843 F.2d at 145, p. 15a, *infra.*, although the arguments herein apply to both the §1 and §2 claims.

The death of Joseph White provided the impetus for the eventual revocation of Dr. Miller's staff privileges at the Hospital. The day after Mr. White's death, Petitioner Dr. Melvin C. Williams reported the incident to the president of the medical staff, Petitioner Dr. Richard Freda. In his report, Dr. Williams stated that he was "reporting this episode because I feel that there have been conduct, acts and omissions detrimental to the health and safety of a patient and because the quality of care rendered is below that which would be acceptable in any hospital" (pp. 64a-65a, *infra.*).

On February 24, 1977, Petitioner Dr. Williams sent a letter to the Hospital's Executive Committee, of which he was a member. In his letter, Dr. Williams brought to the Committee's attention other instances of Dr. Miller's inadequate care, and formally requested the Executive Committee to suspend Dr. Miller's staff privileges at the Hospital.

Two days later, on February 26, 1977, the Executive Committee met informally with Dr. Miller, but he refused to discuss the charges that had been leveled against him or to respond to questions that surfaced with regard to his care of a second patient.

The Executive Committee, on March 18, 1977, notified Dr. Miller that it would recommend that the Board of Directors of the Hospital revoke his staff privileges. At that point, Dr. Miller demanded a hearing, as he was entitled to do under the staff bylaws and regulations issued by the Pennsylvania Department of Health, 28 Pa. Code §107.12(4). The Executive Committee responded by providing him with a hearing date, along with a list of proposed witnesses and of the charges made against him.

A Hearing Committee of four was appointed, which consisted of three members of the medical staff and one from the dental staff. None of the members of the Committee were urologists, as was Dr. Miller. A full scale hearing, while consumed three days, commenced on June 15, 1977, after a continuance requested by Dr. Miller. All parties were represented by counsel, Dr. Miller was afforded the right to call witnesses to testify in support of him, and he and his counsel were permitted to cross examine adverse witnesses. The entire proceeding was stenographically recorded for later review.

After due consideration of the evidence, the Hearing Committee issued its eight page report, in which it made a number of findings with regard to the charges brought against Dr. Miller. See p. 77a, *infra.*

The report detailed Dr. Miller's unprofessional behavior and incompetent conduct. The Hearing Committee unanimously approved "the Executive Committee's recommendation that the Medical Staff privileges and membership of Dr. Miller be revoked" (p. 83a, *infra.*).

The full Executive Committee adopted the findings and recommendations of the Hearing Committee, following which Dr. Miller appealed to the Hospital's Board of Directors.

Another adversary hearing was held before a committee of four members of the Board, which recommended that the Board affirm the Executive Committee's decision. The full Board adopted the recommendations, and advised Dr. Miller that he could continue with certain of his patients until they were discharged on October 14, 1977, at which time he would have his staff privileges revoked.

At this point Dr. Miller resorted to the courts, and obtained an *ex parte* preliminary injunction from the Indiana Court of Common Pleas, which was issued on October 14, 1977. The suit was filed against the Hospital alone, and the preliminary injunction prevented the revocation of Dr. Miller's staff privileges. The injunction was dissolved on the Hospital's motion on February 9, 1978, and the trial court wrote a lengthy opinion in this regard. On June 29, 1978, the state trial court issued its second opinion, this time denying Dr. Miller's request for a permanent injunction. See p. 59a, *infra*.

The state trial court reviewed the record "to determine whether or not (a) findings of fact are supported by substantial evidence, (b) there has been an abuse of discretion, or (c) a purely arbitrary exercise of authority." It noted that "[j]udicial discretion may not be substituted for administrative discretion . . ." (p. 63a, *infra*.).

Among the Findings of Fact by the Indiana County Court was that:

> 13. Plaintiff was accorded a full and fair hearing which was in strict compliance with the procedural requirements set out in the bylaws. The essential elements of due process in administrative cases, notice, the opportunity to be heard and to defend in an orderly proceeding, adapted to the nature of the case, were present.

(p. 66a, *infra*.).

In its Conclusions of Law, the Indiana County Court concluded:

> 2. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was in compliance with the by-laws of the hospital and the medical staff.

> 3. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was not arbitrary, capricious, or contrary to law.
>
> 4. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was based on proper cause under the by-laws of the hospital under the medical staff and the legal powers of the governing board of the defendant-hospital in the operation of the hospital.

(p. 75a, *infra.*).

Following the Indiana County trial court's denial of Dr. Miller's request for a permanent injunction, he appealed to the Pennsylvania Superior Court. On April 3, 1980, the Superior Court issued its decision, affirming the trial court in all respects. *Miller v. Indiana Hospital*, 277 Pa. Super. 370, 419 A.2d 1191 (1980). See p. 46a, *infra.* The Pennsylvania Supreme Court denied Dr. Miller's Petition for Allowance of Appeal on October 1, 1980.

In its Opinion, the Pennsylvania Superior Court found that "the hospital procedure afforded him comprehensive safeguards including: written notice, an opportunity to prepare and to be heard, a right to counsel, a right to present witnesses and to cross examine, stenographic transcription of the proceedings, and an appeal of right to the Board of Directors. We therefore conclude that appellant was dismissed in a fair and impartial manner in accordance with the hospital bylaws and is not entitled to injunctive relief." 277 Pa. Super. at 380, 419 A.2d at 1196, p. 58a, *infra.*

Following his total lack of success in the Pennsylvania courts, Dr. Miller shifted his attack to the federal courts, filing his complaint with the United States District Court for the Western District of Pennsylvania on July

2, 1981. During the time after the revocation of his privileges, Dr. Miller had continued to apply for reinstatement of his privileges with no success. The Third Circuit assumed these subsequent requests were part of his complaint. See, 843 F.2d at 142, n.3, p. 8a, *infra.*

Dr. Miller's federal complaint and subsequent amendments were directed not only to the Hospital, but also named as defendants individuals who were administrators of the Hospital, members of the Board of Trustees, members of the Executive Committee of the Medical Staff of the Hospital, and members of the Medical Staff. Also sued was the Commonwealth of Pennsylvania and Dr. H. Arnold Mueller, M.D., Secretary of the Pennsylvania Department of Health. Both Dr. Mueller and the Commonwealth of Pennsylvania were subsequently dismissed, leaving as defendants Indiana Hospital and twenty-four (24) individuals, all Petitioners therein.

The complaint, as amended, alleges a number of legal theories. However, the only claim that is now sought to be reviewed is Dr. Miller's claim under the Sherman Act.

The essence of the Section 1 claim that remains relevant, as found in Dr. Miller's "Amendment to Complaint," is that the individual physician Petitioners are competitors of Respondent Dr. Miller, and that they conspired and agreed with the Petitioner Hospital to eliminate him as a competitor by revoking his staff privileges, allegedly since Respondent Dr. Miller had opened his own Indiana Medical Center in competition with the Hospital.

The case was assigned to District Judge Carol Los Mansmann (now of the Third Circuit Court of Appeals), who on April 27, 1983, issued a lengthy opinion on

defendants' motion for judgment on the pleadings, which disposed of many issues not involved in this Petition. *Miller v. Indiana Hospital*, 562 F. Supp. 1259 (W.D.Pa. 1983). Dr. Miller's antitrust claims survived this skirmish.

Discovery proceeded, and with the elevation of Judge Mansmann to the Third Circuit, the case was re-assigned to District Judge Paul A. Simmons. In due course the parties filed cross motions for summary judgment, which were ruled on by Judge Simmons in the first of two Opinions on February 10, 1986, p. 32a, *infra*.

In his February 10, 1986 Opinion, Judge Simmons relied heavily on a prior decision from the Western District of Pennsylvania, *Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D.Pa. 1982), and concluded he needed to review the record of the Hospital Hearing Committee in order to rule on the motions.

Subsequently, the parties renewed their motions for summary judgment, and submitted the transcript of the Hospital Hearing Committee to Judge Simmons. On May 6, 1987, Judge Simmons issued his second Opinion, and dismissed all of the remaining claims of Respondent. *Miller v. Indiana Hospital*, 660 F. Supp. 250 (W.D.Pa. 1987), p. 20a, *infra*.:

> This Court, finds as did two prior State Courts, that Dr. Miller's hearing which terminated his physician's staff privileges did in fact meet the requirements of both procedural and substantive due process of law and that in fact the reasons set forth by the defendants for the termination of Plaintiff's staff privileges are supported by substantial evidence. Plaintiff, Dr. Miller was dismissed in a fair and impartial manner and as aforestated he was accorded due process of law. Therefore, this Court will grant Defendant's Motion

> for Summary Judgment and deny Plaintiff's Motion for Summary Judgment as to Count II, the federal anti-trust claim.

660 F. Supp. at 254, pp. 29a-30a, *infra*.

Dr. Miller appealed the dismissal of his complaint to the United States Court of Appeals for the Third Circuit. On March 31, 1988, the Third Circuit issued its decision, and reversed the district court's grant of Petitioners' motion for summary judgment. 843 F.2d 139 (3rd Cir. 1988), p. 1a, *infra*. It also denied the Hospital's Petition for Rehearing *in banc* on April 22, 1988, p. 19a, *infra*., and stayed the issuance of the certified judgment on May 5, 1988, p. 18a, *infra*.

The Third Circuit did not take issue with the finding of the state courts and the district court that Dr. Miller had received due process of law and that there was substantial evidence to support the Hospital's action. Nor did it question the correctness of the Hearing Committee's conclusion that Dr. Miller was professionally incompetent and that he engaged in unprofessional conduct. Rather, the Third Circuit found it was up to the fact-finder to determine if Dr. Miller's professional incompetence had motivated Petitioners' action or whether the true motivation was anticompetitive.

The result of the Third Circuit decision is that Petitioner Hospital as well as the individual Petitioners will be subjected to a full scale antitrust trial in order for the jury to determine whether Dr. Miller's staff privileges were revoked and not renewed "because of his incompetence and hence a reasonable restraint or whether it was a result of anticompetitive motivation and thereby constituted a prohibited restraint of trade." 843 F.2d at 145, pp. 14a-15a, *infra*.

Of even greater significance is the view of the Third Circuit that *even if* Dr. Miller is found by a district court jury to be professionally incompetent and his conduct unprofessional, his antitrust claim will nevertheless survive if the jury believes the revocation of his staff privileges arose from anticompetitive motives. The Third Circuit stated that if the jury "decides that the restraint of trade was unreasonable, [it] will also fix the amount of any damages. [Citation omitted.] At that stage, it would be the responsibility of the court to determine whether, on the basis of the evidence relating to Miller's professional competence, it should direct the reinstatement of his staff privileges." 843 F.2d at 145, p. 15a, *infra*.

Under the rationale of the Third Circuit, this case is destined to go to a jury even though the Third Circuit does not disagree that Dr. Miller was afforded full due process protection and that there is substantial evidence to support the Petitioner Hospital's finding of incompetence. Moreover, under this rationale, Dr. Miller will be able to seek damages even if the jury determines that he was, in fact, professionally incompetent and engaged in unprofessional conduct.

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's rejection of the "substantial evidence" test unnecessarily jeopardizes our nation's physician peer review system and threatens the quality of health care available in our country.

Under the Third Circuit holding, hospitals and physicians participating in state-mandated peer review will be subject to jury trials for antitrust liability in order to determine if their actions were anticompetitively motivated, even though the complaining physician was found to be professionally incompetent after a hearing meeting all due process requirements, and the finding of incompetence was supported by "substantial evidence."

The Third Circuit decision will have a severe chilling effect on the medical community's efforts to weed out incompetent and unqualified medical practitioners.

The public health and welfare will be placed at risk if conscientious and dedicated physicians are not afforded some degree of protection from questionable antitrust claims filed by disgruntled physicians who have been denied staff privileges or who have had their privileges revoked. A decision with such far-reaching human effect deserves this Court's attention.

Neither the courts nor juries of lay persons are qualified to judge the professional competence of physicians, nor is it their task to do so. This point was made clear by the Fifth Circuit:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice

> of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered.

Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971).

Most states, including Pennsylvania, require hospitals to provide a committee of physicians and dentists to review applications of other physicians and dentists for clinical privileges at the hospital. Pennsylvania's statute is the Health Care Facilities Act, 35 Pa. C.S.A. §448.101 *et seq.* (1979), with detailed regulations issued pursuant to the Act at 28 Pa. Code §107.1 *et seq.*

Concern for antitrust exposure of peer review groups has been raised in numerous cases. The Seventh Circuit expressed it by stating:

> It is only logical that physicians within the State of Indiana, when presented with allegations of Federal antitrust violations and the threat of treble damages, will either dilute their peer review reports and cease recommending the revocation of a hospital staff member's privileges or will discontinue their participation in the state mandated and supervised peer review process. As a result, the very lifeline of the medical peer review process will be severed.

Marrese v. Interqual, Inc., 748 F.2d 373, 391 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S. Ct. 3501 (1985).

One way to protect the applicant, while not subjecting the participants to unwarranted exposure to costly and time-consuming litigation, is to limit the court review to the questions of due process and the existence of substantial evidence in support of the peer group's findings. This is the method employed by the district court in this case, which granted Petitioners' motion for summary judgment after finding that all due process requirements were met, and that in fact substantial evidence had been presented at the hearing supporting the peer group's conclusion that Dr. Miller was professionally incompetent.[2] The "substantial evidence" test in the hospital staff privilege context has its origin in *Pontius v. Children's Hospital*, 552 F. Supp. 1352 (W.D.Pa. 1982), on which the district court in this case relied.

The *Pontius* court was acutely aware of the time and expense entailed in a full blown antitrust trial for revocation of privileges, since the district judge had recently concluded such a trial which consumed several months. 552 F. Supp. at 1365, 1372. The court held that a restraint is unreasonable "only if the anticompetitive effects predominate" over the procompetitive effects. 552 F. Supp. at 1371.

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[2] Another method of protecting the participants is to grant them immunity under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 (1943). Petitioners argued this theory before both the district court and the Third Circuit, but neither court reached this issue. *See*, Third Circuit Opinion, n.9, 843 F.2d at 145, p. 15a, *infra*. This Court's recent ruling in *Patrick v. Burget*, 56 U.S.L.W. 4430 (U.S. May 16, 1988), while not finding immunity in the Oregon peer review scheme, leaves room for a finding of immunity under Pennsylvania's practices and procedures. However, since the record is not yet fully developed on this issue, Petitioners are not requesting a review of Pennsylvania's regulatory scheme at this time.

Applying the rule of reason test, the *Pontius* court granted defendant's motion for summary judgment, holding that a revocation of staff privileges is a reasonable restraint as a matter of law if the hospital had substantial evidence to support its actions, and due process was provided to the complaining physician:

> We see no reason, however, that a court's finding of substantial evidentiary support for a hospital staff decision, taken pursuant to full procedural due process, must await trial. The question of whether the evidence before the hospital committee passing on the privilege issue is substantial or not is essentially a question of law for a reviewing court. *Cf. United States v. Bianchi & Co.*, 373 U.S. 709, 714-718, 83 S. Ct. 1409, 1413-15, 10 L.Ed. 2d 652 (1963). Thus we hold that in order to withstand a summary judgment motion on section 1 claims alleged to arise out of a hospital's decision to terminate a plaintiff physician's staff privilege, the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, that the hospital lacked substantial evidence in support of its ultimate decision. Only then will a question of fact be raised at [sic] to the reasons for the hospital's action.

Pontius v. Children's Hospital, 552 F. Supp. 1352, 1372 (W.D.Pa. 1982).

In the instant case the Third Circuit did not disagree with the district court that due process was complied with and substantial evidence to support the finding of professional incompetence was present. However, the Circuit rejected the district court's legal conclusion that so long as the hospital and its staff afforded Respondent due process of law and that it had substantial evidence to support its action, its conduct was not unreasonable under the rule of reason test. The Circuit held that Dr.

Miller had produced evidence of anticompetitive motive sufficient to create a genuine issue of fact as to the motivation of the hospital and its staff, thus eliminating summary judgment and forcing a full scale trial on the issue of motivation.

The Third Circuit's reason for rejecting the "substantial evidence test" was that it "is derived from administrative law and reflects the deference that a judicial body owes to the administrators entrusted with regulatory authority," citing *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477-88, 71 S. Ct. 456, 459-65 (1951). 843 F.2d at 143, p. 10a, *infra*.

While the Third Circuit may have been correct as to the origin of the substantial evidence test, this in itself does not argue against applying the test to quasi-judicial activities, such as those performed by state-mandated peer review groups.

This Court has recognized that different antitrust concepts may apply to professions, especially when they are performing public service functions. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-789 n.17. 95 S. Ct. 2004, 2013 n.17 (1975). As this Court later pointed out, this does not grant an exemption from the antitrust laws for the learned professions, but it may require different antitrust treatment for professionals. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696, 98 S. Ct. 1355, 1367 (1978). This different treatment does not extend to price-fixing, *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-349, 102 S. Ct. 2466, 2475 (1982), but physicians should be entitled to some degree of protection when they are performing their difficult task of judging their peers.

The "substantial evidence" test adopted by the trial court is consistent with the treatment of hospital privilege decisions by the Pennsylvania courts.[3] They view hospital staff decisions to be, in effect, agency decisions, and limit their review accordingly. In this case, the Pennsylvania Superior Court cited administrative agency law while ruling on an evidentiary issue, *Miller v. Indiana Hospital*, 277 Pa. Super. 370, 376, 419 A.2d 1191, 1194 (1980), pp. 53a-54a, *infra*. The Indiana County trial court specifically found that the decision of the hospital was to be reviewed as "an administrative body vested with broad discretion to maintain and operate the hospital," p. 62a, *infra*. The Indiana County trial court's review was limited "only to determine whether or not (a) findings of fact are supported by substantial evidence, (b) there has been an abuse of discretion, or (c) a purely arbitrary exercise of authority" p. 63a, *infra*. The approach was affirmed by the Pennsylvania Superior Court. *Miller v. Indiana Hospital*, 277 Pa. Super. 370, 419 A.2d 1191 (1980), p. 46a, *infra*.

The district court's use of the "substantial evidence" test is consistent with the test applied by the Pennsylvania courts in reviewing staff privilege cases. The Third Circuit's observation that the test comes from administrative law should not mean that the test is improper in antitrust cases in the context of quasi-judicial activities of professionals.

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[3] Other state courts are equally hesitant to decide competency issues *de nova* and rely on the findings of other physicians. *See, e.g., Straube v. Emanuel Lutheran Charity Board*, 287 Ore. 375, 600 P.2d 381 (1979), *cert. denied*, 445 U.S. 966, 100 S. Ct. 1657 (1980), cited by this Court in *Patrick v. Burget*, 56 U.S.L.W. 4430 (U.S. May 16, 1988); *Zoneraich v. Overlook Hospital*, 212 N.J. Super. 83, 514 A.2d 53 (1986), *certif. denied*, 107 N.J. 32, 526 A.2d 126 (1986).

The "substantial evidence" test is consistent with this Court's recognition in *Goldfarb, supra*, and its progeny that professionals performing a public service may be found to have not violated the Sherman Act by actions that could be challenged if they were done by other business enterprises. What is "unreasonable" in a business setting may be "reasonable" for professionals performing their public service function.

This court's trilogy of summary judgment cases in 1986 makes it clear that the summary judgment process is important and useful, and should be used when appropriate to dispose of meritless cases. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

Matsushita is particularly relevant here, since it was a Sherman Act case. In *Matsushita*, this Court made it clear that under Rule 56 the standard is not that there is no dispute as to any fact, but whether there is sufficient evidence to go to the jury: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial,' " (citation omitted) 475 U.S. at 587, 106 S. Ct. at 1356.

The Third Circuit in this case found a genuine issue of fact and remanded the case for trial, just as it had done in *Matsushita*. However, when the record in this case is "taken as a whole," it "could not lead a rational trier of fact to find" anything other than that the revocation of Respondent's staff privileges was "reasonable," and thus not violative of the antitrust laws. Under the *Matsushita* standard, no genuine issue of any material fact remains for trial. The "substantial evidence" and due process found by the district court (and with which the Third

Circuit did not disagree) is enough on which to base a legal conclusion of "reasonableness" under the rule of reason standard, as applied to learned professionals performing their state-mandated review function.

This test will provide the courts with the necessary means to protect the rights of physicians who have had their staff privileges rescinded. In those cases where the finding of incompetence is truly unfounded, the reviewing court can simply hold that the Hospital and peer review group did not have sufficient evidence before it to support its conclusion that the complaining physician was incompetent.

But where, as here, the reviewing court has concluded that the complaining physician received a fair hearing with all of the due process safeguards, and there was in fact substantial evidence supporting the reviewing group's findings of incompetence and unprofessional conduct, a legal finding of "reasonableness" is called for, in view of the fact that the process is state-mandated and carried out by professionals performing a public service function.

The nation's health care system is in danger of losing control of the competence of practicing physicians. If questions of the motivation of the participants in peer group reviews can result in jury trials for antitrust claims even when their action is supported by substantial evidence, all effective control of the professional qualifications of physicians allowed to practice in hospitals will be lost. The "substantial evidence" test does not grant complete immunity to the participants, but it does provide a threshold which must be crossed before professional peer review group participants and hospitals are subjected to antitrust jury

trials for performing their state-mandated duties of reviewing and passing on the professional qualifications and competence of their colleagues.

Petitioners request the court to grant certiorari in order to review this extremely important question of law, which will have a far-reaching effect throughout our nation's health care industry, as well as upon the countless number of people whose health and lives may be at risk if our physician peer review system breaks down.

II.

The Third Circuit's instructions on remand permitting the recovery of damages even if the complaining physician is found to be incompetent is unprecedented and will totally disrupt the peer review system.

The Third Circuit's holding does not eliminate antitrust liability *even if* the complaining physician is found to be professionally incompetent at trial. The decision's focus is on the motivation for the revocation, not on the question of whether in fact the complaining physician is professionally qualified to hold staff privileges.

Under the Third Circuit's approach, hospitals and peer review groups can be held liable for treble damages without regard to the competence of the complaining physician. Professional competence becomes relevant only on the issue of reinstatement:

> The evidence produced by Miller is sufficient to raise a genuine issue of material fact as to whether the hospital's conduct in revoking Miller's staff privileges was, as the hospital claims, because of his incompetence and hence a reasonable restraint or whether it was a result of anticompetitive motivation and thereby constituted a prohibited restraint of trade. That issue is for the fact finder which, if it decides that the restraint of trade was unreasonable, will also fix the amount of any damages. *See Weiss,* 745 F.2d at 817. At that stage, it would be the responsibility of the court to determine whether, on the basis of the evidence relating to Miller's professional competence, it should direct the reinstatement of his staff privileges. [Footnote omitted.]

Third Circuit Opinion, 843 F.2d at 144-145, pp. 14a-15a, *infra.*

Thus under the Third Circuit's instructions, if this case is tried on remand the question of Dr. Miller's professional competence is *irrelevant* to his damage claim against Petitioners. The only question relevant to his monetary recovery is the Petitioners' *motivation.* This can lead to the anomalous result of a hospital and its state-mandated peer review group being totally vindicated by a jury in its finding of professional incompetence, *but nevertheless liable for treble damages!*

The only authority cited by the Third Circuit for this astounding conclusion is its own previous decision, *Weiss v. York Hospital,* 745 F.2d 786 (3rd Cir. 1984), *cert. denied,* 470 U.S. 1060, 105 S. Ct. 1777 (1985). The Circuit cites page 817 of the *Weiss* decision, which does not lend any support to the Circuit's revolutionary view that lack of medical competence is irrelevant to a treble damage claim for wrongful termination of staff privileges.

The Third Circuit assumed, without deciding, that the rule of reason test applies to a hospital staff privilege case. 843 F.2d at 144, n.6, p. 13a, *infra.* The rule of reason test requires the fact-finder to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition" (Footnote omitted). *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 49, 97 S. Ct. 2549, 2557 (1977).

In appropriate cases, such as *Monsanto Co. v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S. Ct. 1464 (1984), *rehearing denied,* 466 U.S. 994, 104 S. Ct. 2378 (1984), conduct can be held to be reasonable as a matter of law.

When the rule of reason test is combined with this Court's recognition that professionals, especially when engaged in public service, may require different antitrust

treatment, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-789, n.17, 95 S.Ct. 2004, 2013, n.17 (1975), it is beyond rational explanation for a hospital and a peer review group to be found to have acted unreasonably in terminating the staff privileges of a physician who has been found by the same jury to be professionally incompetent.

Petitioners' primary point is that the fact finder should not be permitted to decide *de novo* the professional competence of the complaining physician, so long as due process safeguards were followed, and substantial evidence was before the hospital and the peer review group to support their finding of incompetence.

However, if the court chooses to reject this primary argument, Petitioners' secondary point is, if a trial is necessary, the first issue to be decided by the jury should be the professional competence of the complaining physician, Dr. Miller. If the jury concludes, in a *de novo* trial, that Dr. Miller in fact engaged in unprofessional conduct and was professionally incompetent, that decision should end the matter.

Under the Third Circuit's instructions on remand, the competence or incompetence of Dr. Miller is not even relevant to his damage claim. This view is totally contrary to the rule of reason test and will destroy Pennsylvania's system of physician peer review. According to the Third Circuit, peer review groups can be absolutely correct in their judgment that a physician is professionally incompetent, have a jury agree with them in a *de novo* trial, and still be liable for treble damages. If this reasoning is not rejected, it will become increasingly difficult, if not impossible, to find physicians willing to run the risk of personal financial ruin in order to serve on peer review groups.

Petitioners submit that a state-mandated peer review group's revocation of the hospital staff privileges of a physician who is indisputably incompetent cannot, as a matter of law, be an unreasonable restraint of trade. If the court chooses to reject Petitioners' primary point concerning the substantial evidence test, then it is requested that the court issue a writ of certiorari on this second issue.

Conclusion

The questions raised by this Petition for Certiorari are extremely important to the continuation of an efficient and safe health care system in our country. The decision by the Third Circuit, unless reviewed by this Court, will create confusion and widespread reluctance for physicians to participate in Pennsylvania's system of monitoring the professional competence of its medical practitioners. The possible effect on the health and lives of all who must seek medical assistance in our hospitals makes this case worthy of this Court's review.

Respectfully submitted,

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[139] **Appendix A--Opinion of the Court of Appeals for the Third Circuit (843 F.2d 139)**

Miller v. Indiana Hosp.
Cite as 843 F.2d 139 (3rd Cir. 1988)

Ralph J. MILLER, M.D.,

Appellant,

v.

INDIANA HOSPITAL, a corporation; Henry F. Hild; Donald F. Smith; William R. McMillen; John S. Simpson; Thomas S. Barbor; Samuel W. Jack, Jr.; Mrs. C. Fred Hildebrand; Mrs. Wanda M. Weyandt; Harry C. McCreary; C. Wilmer Johnston; George M. Evans; Donald S. Brody; Roger J. Reschini; Joseph Kovalchick; William G. Evans, M.D.; Melvin C. Williams, M.D.; Robert G. Goldstrohm, M.D.; David C. Hughes, M.D.; Ralph F. Waldo, M.D.; Herbert L. Hanna, M.D.; Richard N. Freda, M.D.; Frank Weiner, M.D.; Henry Mitchell, M.D.; Ralph R. Brown, M.D.

No. 87-3403.

United States Court of Appeals,
Third Circuit.

Argued Nov. 6, 1987.

Decided March 31, 1988.

Rehearing and Rehearing En banc
Denied April 22, 1988.

Surgeon brought antitrust action against hospital and its medical and administrative staff after hospital revoked staff privileges. The United States District Court for the Western District of Pennsylvania, 660 F.2d 250, Paul A. Simmons, J., granted summary judgment in favor of hospital. Surgeon appealed. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) district court erroneously applied substantial evidence test to determine if there were genuine issues of material fact to withstand summary judgment, and (2) question of fact as to whether hospital revoked privileges due to alleged incompetence or due to anticompetitive purpose precluded summary judgment.

Reversed and remanded.

1. Monopolies—12(11)

Threshold inquiry in antitrust, staff privilege case was not professional competency of physician; usual antitrust inquiry could not be avoided merely for reason that alleged conspiracy involved hospital. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act, §4, 15 U.S.C.A. §15.

2. Federal Civil Procedure—2484

District Court in antitrust case could not use substantial evidence test to determine if there were genuine issues of material fact to withstand summary judgment. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act, §4, 15 U.S.C.A. §15; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Monopolies—28(7.4)

Substantial evidence test has no place in antitrust case, in that Congress has given jury responsibility to

resolve disputed fact issues. Clayton Act, §4, 15 U.S.C.A. §15; Health Care Quality Improvement Act of 1986, §402 et seq., 42 U.S.C.A. §11101 et seq.

4. Monopolies—12(11)

Surgeon's alleged incompetence and unprofessional conduct was defense that would absolve hospital and members of its administrative and medical staff from anti-trust liability in connection with revocation [140] of staff privileges. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act, §4, 15 U.S.C.A. §15.

5. Monopolies—12(11)

Joint action taken by medical staff in revoking surgeon's staff privileges satisfied conspiracy requirement of prohibition against conspiracy in restraint of trade. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

6. Commerce—62.11

Hospital's treatment of out-of-state patients, purchase of medical supplies from out of state, and receipt of money, including federal funds, from out of state satisfies requirement of affecting interstate commerce for purposes of prohibition against conspiracy in restraint of trade. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

7. Federal Civil Procedure—2484

Whether hospital revoked surgeon's staff privileges due to alleged incompetence or anticompetitive purpose was question of fact precluding summary judgment in surgeon's antitrust action alleging violation of rule of reason. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act §4, 15 U.S.C.A. §15; Fed.Rules Civ. Proc.Rule 56(c), 28 U.S.C.A.

Judd F. Crosby (argued), Evans, Ivory, Moses, Hollander & MacVay, P.C., Pittsburgh, Pa., for appellant.

Larry A. Silverman (argued), Dickie, McCamey & Chilcote, P.C., Pittsburgh, Pa., for appellees.

Before SLOVITER and BECKER, Circuit Judges, and COWEN, District Judge*.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

In this antitrust case filed by a physician against a hospital and members of its administrative and medical staff the district court entered summary judgment for the defendants based on its conclusion that the hospital's decision to terminate the physician's staff privileges was supported by "substantial evidence" of the physician's unprofessional conduct. 660 F.Supp. 250. On appeal, we must decide whether the court erred as a matter of law in using a "substantial evidence" standard for entry of summary judgment.

I.

Plaintiff Ralph J. Miller is a licensed physician and surgeon specializing in urology. He was a teaching fellow at the University of Pittsburgh for several years and has published numerous articles in the area of his medical specialty. He established a practice in Indiana, Pennsylvania in 1959 after obtaining staff privileges in

* Honorable Robert E. Cowen, United States District Judge for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

the Department of Surgery at Indiana Hospital.[1] Indiana Hospital is the only general hospital in the County of Indiana, a county with a population of approximately 93,000 persons and an area of 825 square miles.

Several years after moving to Indiana, Miller purchased land and built a five-office medical building two miles from the hospital. In 1975 Miller erected another building on the land, in which he envisioned housing a comprehensive family-oriented medical center, which was to include a group practice, with pediatricians, family practitioners, and medical and surgical specialists. The center also included on-site laboratory and radiology services which, Miller has averred, it could and did provide "at lower cost than the same services at the hospital." App. at 151.

According to the affidavits of Miller and others, the administrators of Indiana Hos- [141] pital perceived Miller and his expansion plans as a threat to the hospital. For example, William Peters, Administrator of the hospital in the 1960's, averred that in the mid-1960's Henry Hild, Chairman of the Board of the hospital, told Peters that he disliked Miller and was concerned about Miller's plans to expand his health care holdings. Robert Knight, Comptroller of the hospital in the early 1970's, averred that people within the hospital administration were fearful that Miller and his expansion plans posed a threat to the hospital and that they wanted to "gather sufficient medical staff support to keep Dr. Miller from hiring good doctors to staff his medical center." App. at 140-141. Don Gaydos, Director of Fiscal Services at the

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[1] The grant of hospital staff privileges, also known as admitting privileges, is required before a physician may admit or treat patients at that hospital. *See generally* Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 Houston L.Rev. 707 (1981).

hospital in the early to mid 1970's, averred that Donald Smith, President of the hospital, told Gaydos "to befriend Dr. Miller so that I [Gaydos] could gather information on what and how Dr. Miller was planning as to expansion of his medical office building and his health care center so that I could report these things back to Mr. Smith." App. at 138.

In 1977, a patient under Miller's care at the hospital died. After a member of the medical staff's executive committee wrote several letters to the staff's president regarding the allegedly inadequate care Miller had provided to the deceased patient and others, the hospital's executive committee held an informal meeting, which Miller attended. The executive committee thereafter sent Miller written notice of its decision to recommend to the hospital's board of directors that Miller's staff privileges be revoked.

Following Miller's demand for a hearing, the executive committee notified Miller in writing of the hearing date, the charges against him, and the names of the witnesses who were to appear. The hearing committee was comprised of three members of the hospital's medical staff and one member of the dental staff; the hospital's legal counsel presided. Miller was represented by counsel, and was able to present and cross-examine witnesses. The hearing lasted for three days, produced over twenty-two hundred pages of transcript testimony and exhibits, and resulted in a recommendation that Miller's staff privileges be revoked.

Specifically, the hearing committee found that Miller had exhibited "disruptive, insulting, intimidating, disrespectful, disparaging, abusive and other improper behavior" toward various members of the staff, App. at 287-90; that he had acted improperly in the case of the

deceased patient by failing to request a medical consultation, by failing to order certain tests, and by making improper entries in the patient's record; that he had failed to comply with an order of the Bureau of Medical Assistance barring him from writing Medical Assistance prescriptions; that he had acted unprofessionally by discussing confidential medical information with a layperson; and that he had failed to carry out certain administrative duties.

The executive committee of the medical staff adopted the hearing committee's recommendation, as did the hospital's Board of Directors. In accordance with the hospital's bylaws, Miller's staff privileges were then revoked.[2]

Miller filed an action against the hospital in the Court of Common Pleas of Indiana County, alleging, *inter alia*, breach of contract, defects in the hearing proceedings, and Fourteenth Amendment due process violations. The court granted his *ex parte* motion for a preliminary injunction, but subsequently dissolved the injunction and denied his request for a permanent injunction. The Superior Court of Pennsylvania affirmed the trial court's denial of injunctive relief, finding that "the charges against [Miller] were supported by sufficient evidence" and that Miller "was dis- [142] missed in a fair and impartial manner in accordance with the hospital bylaws." *Miller v. Indiana Hospital*, 277 Pa.Super. 370,

[2] Commentators have explained that the absence of staff privileges is devastating to a physician, especially to a specialist such as a surgeon, who depends to such a large degree on the technology and equipment found only in a hospital setting, and puts the physician at "a competitive disadvantage, if for no other reason than it connotes a second-class practitioner." Dolan & Ralston, *supra*, 18 Houston L.Rev. at 713-14; *see also Weiss v. York Hospital*, 745 F.2d 786, 794 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

380, 419 A.2d 1191, 1196 (1980). The Supreme Court of Pennsylvania denied Miller's petition for allowance of appeal. *See* App. at 24.

In 1977 and 1978, Miller applied for and was denied staff privileges. In 1979 the hospital refused even to consider his application for staff privileges for 1980, and for the next three years it refused even to furnish him with an application.

In 1981 Miller filed the present action in federal district court in which he named as defendants the hospital and approximately twenty-five individual hospital administrators and medical staff members (collectively referred to as "the hospital"). The complaint alleged a conspiracy to deprive Miller of his civil rights and violations of both federal and state antitrust laws and various other state law claims. Miller sought an injunction requiring the hospital to accept and process his application for staff privileges, as well as compensatory and punitive damages.[3]

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[3] There is some ambiguity in the record as to whether this action is directed to the hospital's initial termination of Miller's privileges or its subsequent refusal to consider his application for reinstatement. The complaint suggests the latter; amendments thereto include the former. Ruling on the defendants' motion to dismiss, the district court determined that the substance of Miller's complaint was limited to the hospital's refusal to accept or process his applications for staff privileges; however, in ruling on the summary judgment motion at issue in the present appeal, the court focused on the revocation as well. At oral argument before this court, counsel for Miller stated that both the initial revocation and the subsequent refusal to reinstate were at issue. We do not attempt to resolve this discrepancy because it would not affect the outcome of this appeal. For the sake of simplicity, we will refer to the "termination" of Miller's staff privileges as encompassing the initial revocation and subsequent refusals to reinstate.

The district court dismissed all of Miller's claims except for the antitrust claims, *Miller v. Indiana Hospital*, 562 F.Supp. 1259 (W.D.Pa.1983), and Miller does not appeal from that ruling. After further discovery, the respective parties moved for summary judgment on the remaining antitrust claims.

The district court, relying on another decision from the same district, ruled that in order for a plaintiff physician to withstand summary judgment in an antitrust action arising out of a hospital's decision to terminate the physician's staff privileges, "the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, that the hospital lacked substantial evidence in support of its ultimate decision." *Miller v. Indiana Hospital*, No. 81-1091, slip op. at 11-12 (W.D.Pa. February 10, 1986) (quoting *Pontius v. Children's Hospital*, 552 F.Supp. 1352, 1372 (W.D.Pa.1982)). The court further stated that "whether there is substantial evidence to support the decision of the hospital committee to discharge a physician or to deny staff privileges to that physician is a question of law for a reviewing court and the resolution of that question need not await trial." *Miller v. Indiana Hospital*, No. 81-1091, slip op. at 11.

After reviewing the transcript of the proceedings before the hospital's hearing committee, the court found the requisite "substantial evidence." It therefore granted the hospital's motion for summary judgment, denied Miller's motion for summary judgment, and dismissed the pendent state law claims. *Miller v. Indiana Hospital*, 660 F.Supp. 250 (W.D.Pa.1987). Miller appeals.

II.

[1] We have plenary review of the district court's application of legal precepts, in this case its use of a substantial evidence test to grant summary judgment. *Universal Minerals, Inc. v. C.A. Hughes & Company*, 669 F.2d 98, 101-02 (3d Cir.1981). The hospital argues that because this court stated in *Weiss v. York Hospital*, 745 F.2d 786, 820 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985), that a medical staff "is . . . entitled to exclude individual doctors . . . on the basis of their lack of professional competence or unprofessional conduct," the threshold inquiry in an antitrust staff privi- [143] lege case is the professional competency of the individual physician. The hospital misreads *Weiss*. Nothing in that case suggests that the usual antitrust inquiry may be avoided merely because the conspiracy alleged involves a hospital.

[2, 3] In *Weiss*, the jury had found in favor of the plaintiff class of osteopaths on its claim that in refusing to grant staff privileges the members of the defendant hospital's medical staff had conspired in violation of section 1 of the Sherman Act. *Id.* at 799-801. On appeal, this court applied traditional antitrust analysis to the defendants' exclusionary conduct. *Id.* at 812-30. In contrast, the substantial evidence test used by the district court here and in *Pontius* is derived from administrative law and reflects the deference that a judicial body owes to the administrators entrusted with regulatory authority. *See Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477-88, 71 S.Ct. 456, 459-65, 95 L.Ed. 456 (1951). That test has no place in an antitrust case where Congress has given the

jury the responsibility of resolving disputed fact issues. *See* 15 U.S.C. §15.[4]

[4] In this case, Miller contends that his hospital staff privileges were revoked and his applications for reinstatement denied because defendants wished to stifle his competition. He contends that the outcome of the hearing pursuant to which his privileges were revoked was predetermined and that he was treated more severely than other physicians whose competence was in question but who presented no economic threat to the defendants. Defendants' argument that they revoked Miller's staff privileges because of his professional incompetence and unprofessional conduct is a defense they may present before the jury which, if convinced, will absolve them of any antitrust liability. It is inappropriate and unprecedented, however, to pretermit the jury's consideration of the parties' various contentions under the rubric of the substantial evidence test. Such a test defers to the manner in which defendants themselves, who are parties in interest, weighed the evidence and drew inferences. Moreover, the substantial evidence test effectively eliminates any application of the antitrust laws to defendants' actions. It is apparent therefore that the district court erred as a matter of law in applying a substantial evidence test to determine if there were genuine issues of material fact to withstand summary judgment.

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[4] The Health Care Quality Improvement Act of 1986, 42 U.S.C. §§11101 *et seq.*, applicable to professional review actions commenced on or after November 14, 1986, provides a degree of immunity to hospital peer review decisions. Because this legislation is not applicable to this litigation, we do not decide if the hospital's actions were immunized thereunder.

III.

Because our review of an order granting summary judgment is plenary, *see Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977), we consider the hospital's summary judgment motion under the proper legal standard. Summary judgment may be granted only if there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). While the moving party has the burden initially of identifying that evidence that demonstrates the absence of a genuine issue of material fact, the nonmoving party must make a sufficient showing to establish the existence of every element necessary to its case and on which it bears the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Equimark Commercial Finance Co. v. C.I.T. Financial Services Corp.*, 812 F.2d 141, 144 (3d Cir.1987). Credibility determinations are not the function of the judge; rather, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 106 S.Ct. at 2513.

[5, 6] The summary judgment standard is no different in antitrust litigation than in any other. *See Matsushita Electric In-* [144] *dustrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see also Tunis Brothers Co., Inc. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir.1987), *cert. denied*, _____ U.S. _____, 108 S.Ct. 1013, 98 L.Ed.2d 979 (1988). A claim under section 1 of the Sherman Act, 15 U.S.C. §1 (1982), requires proof of a contract, combination or conspiracy, a restraint of trade, and an effect on interstate commerce.

See Weiss, 745 F.2d at 812. We do not understand the hospital at this stage of the proceeding to be challenging either the elements of conspiracy or the interstate commerce effect of its actions;[5] the central issue for summary judgment was the reasonableness of the restraint.

[7] Miller concedes for the purpose of this appeal that a rule of reason analysis is applicable to the hospital's conduct.[6] The hospital argues that its conduct was patently reasonable because Miller, after a full hearing approved by the state court, was found to have demonstrated professional incompetence and unprofessional conduct. However, Miller has produced evidence which, if believed by the jury, would show that, in fact, the hospital's revocation of his privileges, although ostensibly for professional incompetence and

[5] Under this court's precedent, the joint action taken by the medical staff satisfies the conspiracy requirement. *Weiss*, 745 F.2d at 814. Similarly, a hospital's treatment of out-of-state patients, purchase of medical supplies from out of state, and receipt of money from out of state, including federal funds, satisfies the requirement of affecting interstate commerce. *See Weiss*, 745 F.2d at 824-25; *see also Cardio-Medical Associates, Ltd. v. Crozier-Chester Medical Center*, 721 F.2d 68 (3d Cir.1983).

[6] In *Weiss v. York Hospital*, 745 F.2d 786 (1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985), we applied a *per se* analysis to the antitrust claim of the class of osteopathic physicians based on the denial of staff privileges at a hospital. We reasoned that the hospital's actions were the functional equivalent of a group boycott, which is illegal *per se* under section 1 of the Sherman Act, 15 U.S.C. §1 (1982). *See United States v. General Motors Corp.*, 384 U.S. 127, 145-46, 86 S.Ct. 1321, 1330-31, 16 L.Ed.2d 415 (1966). We recognized that in a hospital staff privilege case in which the hospital defends on lack of professional ability, the rule of reason test would apply. *Weiss*, 745 F.2d at 820-22.

The Supreme Court recently rejected application of a *per se* analysis in a case involving the expulsion of a member from a wholesale buying cooperative. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985). Because Miller accepts the rule of reason test for purposes of this appeal, we need not decide in this case the effect of *Northwest Wholesale* on our holding in *Weiss*.

unprofessional conduct, was motivated by the anticompetitive purpose of destroying Miller's competition or prospective competition.

The affidavits of former hospital administrators, referred to in Part I above, provide evidence that even before the death of Miller's patient, the hospital expressed concern about Miller's competition. Miller's affidavit sets forth evidence of at least one example of the hospital's interference with his recruitment of medical staff for his proposed medical center by encouraging a pediatrician to break his contract with Miller; of its failure to terminate the staff privileges of other physicians whose professional infractions were allegedly more substantial than Miller's;[7] and of irregularities and possible conflicts of interests in the hearing process itself, such as the fact that the presiding officer of the hearing was counsel for the hospital and that the chairman was a physician against whom Miller had previously filed charges of unethical conduct with the state board of licensure.

The evidence produced by Miller is sufficient to raise a genuine issue of material [145] fact as to whether the hospital's conduct in revoking Miller's staff privileges was, as the hospital claims, because of his incompetence and hence a reasonable restraint or whether it was a result of anticompetitive motivation and thereby

[7] Miller points, for example, to evidence that even though the hospital had strong reasons to believe that one of its physicians who was being treated for clinical depression was addicted to drugs and that that doctor had failed to make rounds, failed to attend staff meetings, delayed treating patients and scheduling patient operations, and overprescribed narcotics, the hospital merely placed that doctor on probation. In *Weiss*, we noted the relevance for antitrust purposes of a hospital's failure to apply the same standards to all physicians seeking staff privileges. We explained that "we do not doubt that a hospital could exclude an applicant from staff privileges either because he is not medically qualified or because of unprofessional conduct, *so long as the hospital applies the same standards to all applicants.*" 745 F.2d at 821 n. 60 (emphasis added).

constituted a prohibited restraint of trade. That issue is for the fact finder which, if it decides that the restraint of trade was unreasonable, will also fix the amount of any damages. *See Weiss*, 745 F.2d at 817. At that stage, it would be the responsibility of the court to determine whether, on the basis of the evidence relating to Miller's professional competence, it should direct the reinstatement of his staff privileges.[8]

IV.

For the foregoing reasons, we will reverse the district court's order granting the hospital's motion for summary judgment, and remand for further proceedings consistent with this opinion.[9]

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[8] Because the parties have focused only on Miller's claim under Section 1 of the Sherman Act, we do not reach Miller's claim that the hospital also violated section 2 of the Sherman Act. A ruling on this claim would require the district court to rule on the relevant product and geographic markets and determine whether the hospital occupies a position of monopoly within them. *See Weiss*, 745 F.2d at 825. We assume that on remand there will be further development of the record. *See Potters Medical Center v. City Hosp. Ass'n*, 800 F.2d 568, 574 (6th Cir. 1986).

[9] The hospital contends, as an additional matter, that it is entitled to summary judgment because it is immune from antitrust review under the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The district court did not reach this issue, and, given the factual intricacies involved, for example, whether the Pennsylvania statutes and regulations regarding physician peer review constitute the requisite state action, we believe that it would be more appropriate for the district court to address it in the first instance.

We note that the Supreme Court has granted certiorari in one case in which a court of appeals held that a private hospital's revocation of a doctor's staff privileges was immune from federal antitrust liability under the *Parker* doctrine. *Patrick v. Burget*, 800 F.2d 1498 (9th Cir.1986), *cert. granted*, _____ U.S. _____, 108 S.Ct. 65, 98 L.Ed.2d 29 (1987). *Patrick* was argued on February 22, 1988; the district court may be well-advised to await the Court's decision should the immunity issue become relevant in this case.

Appendix B—Judgment of the Court of Appeals for the Third Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3403

RALPH J. MILLER, M.D.,

Appellant,

v.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.

Appeal from the United States District
Court for the Western District
of Pennsylvania
(D.C. Civil No. 81-1091)

Present: SLOVITER, BECKER *Circuit Judges* and
COWEN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel November 6, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 7, 1987, be, and the same is hereby reversed and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellees.

ATTEST:

SALLY MRVOS
Clerk

March 31, 1988

* Hon. Robert E. Cowen, U.S. District Judge for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

Appendix C—Order of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3403

Ralph Miller, M.D.,

Appellant,

vs.

Indiana Hospital etc..

PRESENT: Sloviter, Becker and Cowen, *Circuit Judges*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 28, 1988.

DOLORES K. SLOVITER
Circuit Judge

Dated: MAY 5 1988

Appendix D—*Sur* Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3403

Ralph J. Miller, M.D.,

Appellant,

v.

Indiana Hospital, etc.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, GREENBERG, HUTCHINSON, SCIRICA and COWEN, *Circuit Judges.*

The petition for rehearing filed by Appellees, Indiana Hospital, etc. in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

DOLORES K. SLOVITER
Circuit Judge

Dated: APR 22 1988

[250] **Appendix E—Opinion and Order of the District Court for the Western District of Pennsylvania (660 F. Supp. 250)**

United States District Court,
W.D. Pennsylvania.

Ralph J. MILLER, M.D.,

Plaintiff,

v.

INDIANA HOSPITAL, a corporation, et al.,

Defendants.

Civ. A. No. 81-1091.

May 6, 1987.

Doctor brought antitrust action against hospital after hospital terminated doctor's staff privileges. The District Court, Simmons, J., held that: (1) hospital's stated reasons for terminating doctor's staff privileges were supported by substantial evidence; (2) hearing which terminated doctor's staff privileges met the requirements of both procedural and substantive due process of law; and (3) doctor's pendent state antitrust claim had to be dismissed.

So ordered.

[251] *1. Monopolies—12(11)*

Hospital's stated reasons for terminating doctor's staff privileges on grounds of unprofessional conduct were supported by substantial evidence, and thus, under the

rule of reason standard, termination of doctor's privileges did not violate antitrust law; there was evidence that doctor's care of patient who died was below acceptable standards and that doctor had exhibited disruptive, insulting, intimidating, disrespectful, abusive, and other improper behavior and unprofessional conduct toward other doctors, nurses, and hospital personnel on many occasions.

2. Constitutional Law—275(1.5)

Hearing which terminated doctor's staff privileges met requirements of both procedural and substantive due process of law; hospital hearing committee, which consisted of three members of the medical staff, held hearing lasting several days in which both doctor and the committee presented and cross-examined numerous witnesses in support of their respective positions, and both doctor and committee were represented by counsel. U.S.C.A. Const.Amends. 5, 14.

3. Federal Courts—18

Doctor's state antitrust restraint of trade claim, which was predicated upon pendent jurisdiction, against hospital, which terminated doctor's staff privileges, had to be dismissed; all doctor's federal claims against hospital had been dismissed, and the district court knew of no authority, common law or statutory, which would support institution of the state antitrust claim in Pennsylvania, the state in which hospital was located.

Judd F. Crosby, Evans, Ivory, Moses, Hollander & MacVay, Pittsburgh, Pa., for plaintiff.

Larry A. Silverman, Dickie, McCamey & Chilcote, Pittsburgh, Pa., for defendants.

OPINION

SIMMONS, District Judge.

This litigation began on March 18, 1977, when the Defendant, Indiana Hospital Executive Committee sent a letter to the Plaintiff, Dr. Ralph J. Miller, advising him that said Committee would recommend to the Defendant Indiana Hospital Board of Directors that Dr. Miller's medical staff privileges should be revoked for professional misconduct.

Doctor Miller demanded a hearing. A Hospital Hearing Committee consisting of three members of the Medical Staff and one member of the Dental Staff was appointed to hold a hearing for Dr. Miller. The hearing officer who presided at the hearing was also legal counsel for the hospital.

The hearing was held and the Hearing Committee recommended the revocation of Dr. Miller's staff privileges. The Defendant Hospital Executive Committee adopted the Hearing Committee's recommendation and the Plaintiff, Dr. Miller, took an appeal to the Defendant Hospital's Board of Directors.

After an adversary hearing, a Committee of four Hospital Directors affirmed the Executive Committee determination against Dr. Miller and subsequently the full Board of Hospital Directors adopted the decision and recommendation of the Committee of four Directors effectively terminating Plaintiff, Dr. Miller's hospital staff privileges.

The Plaintiff, Dr. Miller, thereupon filed for and was granted a preliminary injunction ex parte from the Court of Common Pleas of Indiana County (Civil Division, Equity No. 35 EQ 1977) alleging there was a lack of

substantive and procedural due process of law at the administrative hearings. After a hearing, the Common Pleas Court dissolved the preliminary injunction, denied the Plaintiff, Dr. Miller a permanent injunction and found that Plaintiff, Dr. Miller was accorded a fair hearing supported by competent evidence at the defendant hospital's administrative proceeding.

Dr. Miller, Plaintiff herein, appealed the Common Pleas Court decision to the Pennsylvania Superior Court (*Miller v. Indiana Hospital*, 277 Pa. Super. 370, 419 A.2d 1191 [252] (1980)) wherein the decision of the lower court was affirmed. The Superior Court held:

> a) That the findings in the Administrative Hearing were supported by sufficient and competent evidence;
>
> b) That the doctor did not sustain his burden of showing that the hospital was a quasi-public agency and thus the defendant hospital's revocation of Plaintiff's staff privileges did not constitute State action so as to call into play the protection of the United States Constitution;
>
> c) That the doctor's staff privileges were revoked in a fair and impartial manner in accordance with the hospital bylaws; and
>
> d) Consequently, the Plaintiff, Dr. Miller was was not entitled to Injunctive Relief.

Dr. Miller moved the Superior Court for reargument which was denied. He then petitioned the Pennsylvania Supreme Court for the Allowance of an Appeal to that Court which was denied on October 1, 1980.

The heretofore described State litigation will be referred to as Miller I. The subsequent Federal litigation presided over by Judges Ziegler and Mansmann will be referred to as Miller II. The subsequent Federal litigation presided over by Judge Simmons will be referred to as Miller III.

An action was then brought by Plaintiff, Ralph J. Miller, M.D. in the United States District Court in the above captioned case, "to secure a permanent injunction requiring defendants to accept and process his application for medical staff privileges at the Indiana Hospital" and to award damages.

The original complaint was filed on July 2, 1981, and was in three counts. Count I was founded on the civil rights statutes, 42 U.S.C. §1983 and 1985; Count II on the federal antitrust laws; and Count III on the state antitrust laws. *See Miller v. Indiana Hospital,* 562 F.Supp. 1259, 1270 (W.D.Pa.1983) hereinafter "Miller II"). (Opinion by Mansmann, J.)

In addition, as the Court noted in *Miller II,* the complaint, particularly in Count I, attempted to assert other pendent state claims, including: interference with a prospective business advantage (paragraph 17f); intentional infliction of mental distress (paragraph 17g); defamation (paragraph 17h); and invasion of privacy (paragraph 17h). The Court held in *Miller II,* however, however, that in order for plaintiff to retain these allegations "he must amend his complaint, setting each claim out as a separate count and setting forth the allegations in support thereof by some degree of specificity." *Id.* at 1270-1271. Such an amendment was never filed and these pendent state claims are no longer a part of this lawsuit.

The Hospital defendants filed an answer to the above-described complaint, setting forth numerous affirmative defenses. Thereafter, the Hospital defendants filed a motion for judgment on the pleadings. In a lengthy and scholarly opinion, Judge Mansmann dismissed Dr. Miller's civil rights claims under §1983 and 1985 (Count I) (*See Miller v. Indiana Hospital,* 562 F.Supp. 1259

(W.D.Pa.1983) As noted above, the Court also held that in order for the pendent state claims (aside from the state antitrust claim) to remain in this litigation, plaintiff was required to amend his complaint, which was never done. Finally, the Mansmann, J. Court denied the Hospital defendant's motion for judgment on the antitrust counts of the complaint with leave to renew motions at a subsequent time.

Dr. Miller engaged in extensive discovery after the Court's opinion in Miller II, including: service of over 25 sets of interrogatories, numerous requests for production of documents, resulting in the production of well over 15,000 documents; 7 deposition of non-parties; and requests for admissions.

On December 19, 1984, Judge Mansmann in an Order supported by an opinion, dismissed the Count II Anti-Trust Claim of the Plaintiff, Dr. Miller, that was filed against the Commonwealth of Pennsylvania, Pennsylvania Department of Health and a employee of the Commonwealth of Pennsylvania, H. Arnold Miller, M.D., for [253] the reason that said Commonwealth Defendants were immune from federal antitrust liability.

On December 20, 1984, the Miller II Court ordered that discovery be closed and that the remaining Hospital defendants file their Motion for Summary Judgment as to the remaining anti-trust counts no later than February 15, 1985.

The Federal Court action addressing the remaining Hospital Defendant's Summary Judgment Motion in regard to the Federal Anti-Trust Count II will be referred to as Miller III.

In an opinion filed by Simmons, J. (Miller III), on February 10, 1986, the Court followed the case of *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D.Pa.1982), and held that under the rule of reason standard, the Defendant Hospital was entitled to exclude Plaintiff Dr. Miller from its staff under the established facts and there is no anti-trust violation for a hospital's failure to grant staff privileges (even in the future) if the stated reason for the doctor's termination was because of his unprofessional conduct and if said stated reason or charge of unprofessional conduct is supported by substantial evidence.

After the Court (Miller III) determined on February 10, 1986, that the sole issue remaining in this action as to Count II of the Complaint is whether the Hospital's stated reason for terminating Dr. Miller's staff privileges are supported by substantial evidence, the Court directed Defendants to submit to the Court, the transcripts of the hearing held by the Indiana Hospital Hearing Committee addressing the revocation of Plaintiff's medical staff privileges, in order for the Court to determine whether the decision to terminate Plaintiff's Miller's staff privileges was in fact supported by substantial evidence.

[1] "Substantial Evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951). In the instant case, the Court has carefully reviewed the whole record of the proceedings held by the Indiana Hospital Hearing Committee. Although a factual dispute exists in the testimony of witnesses supporting Dr. Miller's viz-a-viz the witnesses supporting the Indiana Hospital Executive Committee,

there nevertheless exists substantial evidence in the record to support the conclusions of the Indiana Hospital Hearing Board.

Plaintiff argues that the standard for substantial evidence used at the Summary Judgment stage totally eliminates all safeguards designed to insure that a party injured under the Anti-Trust Law receives his day in Court. This Court disagrees relying on the Pontius case as follows:

> Thus we hold that in order to withstand a summary judgment on section 1 claims, alleged to arise out of a hospital's decision to terminate a physician's staff privilege, the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, that the hospital lacked substantial evidence in support of its ultimate decision. Only then will a question of fact be raised as to the reasons for the hospital's action.

Pontius, supra at 1372.

Plaintiff attempts to draw this Court into an attempt to reconcile a substantial evidence standard viz-a-viz a weight of evidence standard, to determine this Summary Judgment Motion. However this Court as aforestated, will follow the position enunciated by Judge Cohill in Pontius, supra at 1372, where it is stated:

> Our holding does not dispense with the need for a trial in hospital privilege cases where a genuine question of fact, rather than law is presented. We do not believe, however, that the Sherman Act created the requirement of a de novo determination of medical staff privilege decisions by either a judge or a jury, if a hospital decides, following a hearing which meets the requirements of due process, to terminate a physician's staff privilege for reasons valid under the antitrust laws, and those reasons are

> supported by substantial evidence, no factual question remains as to section 1 claims the "restraint" is a reasonable one. If, [254] on the other hand, the hospital's decision is not supported by substantial evidence, or the procedure used to reach the decision is substantially defective, a question of fact will be presented as to the reasons for the privilege decision. It is important to note that a mere showing that the reasons advanced by the hospital are not supported by substantial evidence will not prove a plaintiff's case for him. Such a plaintiff will still have to prove that the hospital's decision was motivated by an anticompetitive reason rather than a legitimate one.

Thorough review of the Hospital Administrative Hearing transcript by this Judge reveals that on February 16, 1977, a patient, who had been admitted through the emergency room to Dr. Miller's care, died. Dr. Melvin C. Williams, a member of the Indiana Hospital Executive Committee, sent a report to Dr. Richard Freda, the President of the Indiana Hospital Medical Staff, the next day, stating that Dr. Miller's care of the deceased patient was, "below that which would be acceptable in any hospital." Dr. Williams sent a letter to the Indiana Hospital Executive Committee on February 24, 1977, citing additional instances of inadequate care by Dr. Miller and formally requesting that Dr. Miller's medical staff privileges be suspended. Dr. Miller attending a meeting of the Indiana Hospital Executive Committee on February 26, 1977, at which time he refused to discuss the charges lodges against him. On March 18, 1977, the Indiana Hospital Executive Committee sent a written notice to Dr. Miller indicating that the Executive Committee would recommend to the Indiana Hospital Board of Directors, that Dr. Miller's medical staff privileges be revoked. Dr. Miller demanded a hearing. A hearing date was set by the Indiana

Hospital's Executive Committee for June 15, 1977. Dr. Miller was given a list of the charges filed against him and a list of the witnesses who would be called to support the charges. Dr. Miller was represented by an attorney at all relevant times.

The Indiana Hospital Hearing Committee consisted of three members of the medical staff; one member of the dental staff and the hospital solicitor, who acted as hearing officer. Both Dr. Miller and the Indiana Hospital Executive Committee were represented by counsel.

The hearing lasted several days. Both Dr. Miller and the Indiana Hospital Executive Committee presented and cross-examined numerous witnesses in support of their respective positions. After the hearing was concluded, the Indiana Hospital Hearing Committee found that Dr. Miller had exhibited disruptive, insulting, intimidating, disrespectful, abusive and other improper behavior and unprofessional conduct towards other doctors, nurses and hospital personnel on many occasions. The Hearing Committee also found that Dr. Miller failed to request a medical consultation when needed and failed to order various tests and examinations necessary for the proper medical management of his patient.

[2] This Court, finds as did two prior State Courts, that Dr. Miller's hearing which terminated his physician's staff privileges did in fact meet the requirements of both procedural and substantive due process of law and that in fact the reasons set forth by the defendants for the termination of Plaintiff's staff privileges are supported by substantial evidence. Plaintiff, Dr. Miller was dismissed in a fair and impartial manner and as aforestated he was accorded due process of law. Therefore, this Court will grant Defendant's

Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment as to Count II, the federal anti-trust claim.

In the light of this Court's finding that in this anti-trust action, the rule of reason applied in the Federal anti-trust claim and that the stated actions of the defendants in dismissing the Plaintiff for unprofessional conduct was pro-competitive and was supported by substantial evidence, it is not necessary for this Court to discuss the applicability of the "Parker Doctrine". *See Parker v. Brown*, 317 U.S. 341, 68 S.Ct. 307, 87 L.Ed. 315 and the Seventh and Ninth Circuit cases that hold that hospitals are entirely immune from anti-trust liabili-[255] ty for their medical staff decisions. *See Patrick v. Burget*, 800 F.2d 1498 (9th Cir.1986) and *Marrese v. Interqual Inc.*, 748 F.2d 373 (7th Cir.1984); *cert denied* 472 U.S. 1027, 105 S.Ct. 3501, 87 L.Ed.2d 632 (1985).

It is also well to note that although the case of *Posner v. Lankenau Hospital*, 645 F.Supp. 1102 (E.D.Pa.1986) holds contrary to the "Parker Doctrine" that hospital actions generally are not immune from the anti-trust laws, the *Posner* case holds that the denial of medical staff privileges based on professional or ethical grounds as was the case, (Miller III) now before this Court is procompetitive action and not anti-competitive action and hence, such medical staff decisions pursuant to the rule of reason would not violate the anti-trust laws if the hospital staff decision is supported by substantial evidence. See page 1117 of *Posner* Supra where the Court states:

> An examination of the regulatory scheme does not reveal an intention to replace competition in the market for hospital medical staff positions among physicians with a regulatory structure. *The regulations provide that the denial of medical staff privileges may only be based on professional or*

ethical grounds; which could be viewed as procompetitive, since it prohibits denials made for purely anticompetitive reasons. Most decisions which are made in any competitive job market are based on professional or ethical grounds. Allowing medical staffs to make hospital staffing decisions based on professional or ethical grounds is *not tantamount to an approval of anticompetitive conduct.*

[3] We now turn to Count III of the Plaintiff's Complaint, i.e. his restraint of trade claim under the State anti-trust laws. As noted by Judge Mansmann at page 1286 of her Opinion (Miller II)—"In the event the federal claims are dismissed prior to trial, the state antitrust claim, as well as any other claims predicated upon pendent jurisdiction, may also be dismissed. *See Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3rd Cir.1976.)"

Since all of the Federal claims of the Plaintiff have been dismissed and for the further reason that this Court knows of no authority of any kind, common law and/or statutory, which supports the institution of this State anti-trust action in Pennsylvania, Count III of Plaintiff's Complaint will be dismissed.

An appropriate Order will be entered.

ORDER

AND NOW, this 6th day of May, 1987, after consideration of the record, briefs and contentions of the parties, and for reasons set forth in the accompanying Opinion;

IT IS ORDERED that Plaintiff's renewed Motion for Summary Judgment be and the same is hereby DENIED; Defendants' renewed Motion for Summary Judgment be and the same is hereby GRANTED, and the above captioned case including all three counts of said Complaint and as to all named Defendants are dismissed with prejudice.

[1] **Appendix F—Opinion and Order of the District Court for the Western District of Pennsylvania**

IN THE
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action Number 81-1091.

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINGER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.,

Defendants.

OPINION

I.

Plaintiff, Ralph J. Miller, M.D., brought this action against Defendants seeking monetary damages and injunctive relief for [2] alleged violations of civil rights statutes and federal and state antitrust laws. The Plaintiff contends that the Defendants conspired to violate the federal antitrust laws by revoking Plaintiff's medical staff privileges at the Indiana Hospital in 1977, and by refusing thereafter to accept, process or consider his applications for medical staff privileges at the Defendant Hospital. The above-captioned case was previously assigned to another Judge in this district who dismissed the civil rights claims contained in Count I of the complaint. *See Miller v. Indiana Hospital*, 562 F. Supp. 1259, 1270 (W.D. Pa. 1983). The parties have engaged in extensive discovery on the remaining antitrust claims, discovery has been closed, and both parties have moved for summary judgment. The Plaintiff asserts that he is entitled to summary judgment since the undisputed facts clearly show that there has been a violation of the antitrust laws; the Defendants' motion for summary judgment, however, is based on legal grounds. The Motions have been extensively briefed and argued, and are now ready for decision by the Court.

II.

It is apparent from the record that certain facts are not in dispute. Plaintiff's staff privileges at Indiana Hospital were revoked in 1977, and the events leading to the revocation of Dr. Miller's staff privileges are set forth in *Miller v.* [3] *Indiana Hospital*, 419 A.2d 1191 (Pa. Super. Ct. 1980).

On February 16, 1977, a patient under Dr. Miller's care at the Indiana Hospital died, and the next day, Dr. Melvin C. Williams, a member of the Hospital Executive Committee, sent a report to Dr. Richard Freda, the president of the medical staff, stating that Dr. Miller's care of the deceased patient was "below that which should be acceptable in any hospital." On February 24, 1977, Dr. Williams sent another letter to the Executive Committee, which letter cited additional instances of inadequate care by Dr. Miller and which formally requested that Dr. Miller's staff privileges be suspended. The Executive Committee held an informal meeting on February 26, 1977, which Dr. Miller attended, but Dr. Miller refused to discuss the charges against him. On March 18, 1977, the Executive Committee sent written notice to Dr. Miller that it would recommend to the Board of Directors of the Defendant Hospital that Dr. Miller's staff privileges be revoked. Dr. Miller demanded a hearing, and the Executive Committee informed him of the hearing date and provided him with a list of charges and a list of proposed witnesses.

The hearing began June 15, 1977, and continued for several days. The Hearing Committee consisted of three members of the medical staff and one member of the dental staff. All parties were represented by counsel. The Hearing Committee recommended [4] that Dr. Miller's staff privileges be revoked, which recommendation the Executive Committee adopted. It was the finding of the Hearing Committee that Dr. Miller exhibited disruptive, insulting, intimidating, disrespectful, abusive and other improper behavior and unprofessional conduct towards other doctors, nurses and Hospital personnel on many occasions, and that Dr. Miller failed to request a medical consultation when needed and failed to order various tests and examinations necessary for the proper medical

management of his patient. (Exhibit A to Hild Affidavit). Dr. Miller then sought injunctive relief in the Court of Common Pleas of Indiana County, and when that court failed to grant permanent injunctive relief, Dr. Miller appealed the matter to the Superior Court of Pennsylvania which found that Dr. Miller's staff privileges were revoked in a fair and impartial manner and in accordance with the Hospital bylaws.

Dr. Miller, on September 30, 1977, had forwarded to the Hospital his application for reappointment to the medical staff for the year 1978, which application was deferred pending the outcome of the Court proceedings. *See* Exhibit B to Hild Affidavit. On December 28, 1978, Dr. Miller wrote to the Defendant Hospital applying for medical staff privileges for 1979 (Exhibit C to Hild Affidavit), and on January 22, 1979, Dr. Miller was advised that his application would not be considered due to this recent [5] termination from the staff. Exhibit D to Hild Affidavit. Dr. Miller applied for staff privileges for the year 1980 on November 1, 1979, and was again advised that the Hospital would not consider his application since he had been terminated from the staff. Exhibits E and F to Hild Affidavit. On October 14, 1980, Dr. Miller applied for staff privileges for the year 1981, and the Hospital advised him on December 9, 1980 that the application would not be considered because of his termination from staff and the affirmance of that termination by the Superior and Supreme Courts of Pennsylvania. (Exhibits G and H to Hild Affidavit).

On November 24, 1980, Dr. Miller filed a petition with the Department of Health of the Commonwealth of Pennsylvania, asking that the Hospital be ordered to provide him an application for staff privileges and process that application. (Exhibit I to Hild Affidavit).

This petition was treated as a formal complaint, and the Defendant Hospital was ordered to file an Answer to that Petition. Exhibit J to Hild Affidavit. The Defendant Hospital filed its answer of December 10, 1980, enclosing the copy of the letter which was sent to Dr. Miller, and a letter from counsel, and advising that the basis of the denial of the application was the outcome of the state court litigation which had terminated Dr. Miller's staff privileges. Exhibit K to Hild Affidavit.

[6] The Department of Health issued a determination on December 31, 1980 that the Defendant Hospital was not required to provide Dr. Miller with an application for medical staff privileges, and that the Hospital's decision did not violate Department of Health Regulations or the Hospital's bylaws. Exhibit L to Hild Affidavit. Dr. Miller requested that the Department of Health review this determination, and on January 21, 1981, the Department of Health responded that after careful review, it was still their decision that the Hospital had no obligation to furnish an application for staff privileges, and that no further action would be taken in the matter. (Exhibit M to Hild Affidavit).

On December 4, 1981, Dr. Miller applied for staff privileges for 1982, and on December 3, 1982, Dr. Miller applied for 1983 staff privileges. On both occasions the Defendant Hospital advised Dr. Miller that it would not consider these applications because of Dr. Miller's termination from staff, and the affirmance of that termination by the Pennsylvania courts. (*See* Exhibits N, O, P and Q to Hild Affidavit).

III.

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is properly granted only if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact and that the [7] moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party, and it is the movant who has the burden of establishing that no genuine issue of fact exists. *Lang v. New York Life Insurance Co.*, 721 F.2d 118 (3d Cir. 1983); *Goclowski v. Penn Central Transportation Company*, 571 F.2d 747, 751 (3d Cir. 1977); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972). Rule 56(e) provides that once a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations in his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. This rule that a party cannot rest on the allegations contained in his complaint is also applicable to antitrust cases. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968). In an antitrust case which involves the denial of hospital staff privileges, the record must be closely scrutinized to determine whether or not genuine issues of material fact actually exist.

> If a physician, terminated from hospital privileges after receiving due process, is able to force the hospital to assume the burdens of an antitrust trial on the mere allegation that the hospital's decision was grounded on reasons violative of the Sherman Act, the ability of hospitals to regulate [8] their medical staffs will be seriously impaired.

> Furthermore, if *individual physicians,* who manage to overcome their traditional reluctance to testify about the professional conduct of a colleague, know that by so doing they risk incurring legal fees running into six figures and a trial of a duration measured in months, on the mere allegation that they have conspired to restrain trade, the discovery of incompetent physicians will be rendered extraordinarily difficult.

Pontius v. Children's Hospital, 552 F. Supp. 1352, 1362 (W.D. Pa. 1982) (Cohill, J.) [Emphasis in original].

IV.

In order to establish a violation of section 1 of the Sherman Act, 15 U.S.C. §1, a plaintiff must establish (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce. Restraints of trade are analyzed under the "rule of reason", whereby the Court considers the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed, the nature of the restraint, and its actual or probable effect. *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). In some instances, such as price fixing, division of markets, group boycotts and tying arrangements, there is a presumption that the practice is [9] unreasonable *per se,* without proof of harm or reduction of competition. *Northern Pacific Railroad Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

The rule of reason standard forbids only unreasonable restraints of trade where the anticompetitive effects outweigh the procompetitive effects. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 688-92, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Under the

rule of reason standard the Plaintiff has the burden of showing the unreasonableness of the restraint and that the restraint actually harmed the public by reducing competition. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 166 (3d Cir. 1979); *Sitkin Smelting & Refining Co., Inc. v. FMC Corp.*, 575 F.2d 440, 448 (3d Cir.), *cert. denied*, 439 U.S. 866, 99 S.Ct. 191, 58 L.Ed.2d 176 (1978). The rule of reason standard is the proper standard to be applied in cases involving medical staff decisions. *Pontius v. Children's Hospital*, 552 F. Supp. at 1368-71.

A hospital is entitled to exclude doctors from its staff who are not medically qualified or who engage in unprofessional conduct *Weiss v. York Hospital*, 745 F.2d 786, 820 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985). *See also Kaczanowski v. Medical Center Hospital of Vermont*, 612 F. Supp. [10] 688, 694 (D. Vt. 1985). Such an exclusion does not violate the antitrust laws so long as the same standards are applied to all applicants:

> First, as to medical ability, restricting staff privileges to doctors who have achieved a specified level of medical ability falls within the scope of a hospital's "public service" function, and therefore the rule of reason analysis, not the *per se* rule of illegality, would control. Applying the rule of reason analysis, it seems obvious that by restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of medical care that it delivers. Thus such action is pro-competitive and, therefore, permissible under the rule of reason. . . . The analysis for professional conduct is basically identical. The "public service" function of a hospital is to provide for effective and efficient medical treatment for its patients. One factor in the effective and efficient running of a

> hospital is to provide for effective and efficient medical treatment for its patients. One factor in the effective and efficient running of a hospital is a medical staff that can work together and be courteous to patients and staff. Doctors who have a history of trouble in interpersonal relations can legitimately be excluded because, if admitted, they will reduce the effectiveness [11] of the medical staff, thereby reducing the ability of the hospital to provide top-flight service. In sum, doctors who have trouble getting along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.

745 F.2d at 821 n.60.

There can be no antitrust violation for a hospital's failure to grant staff privileges if the hospital's stated reasons for denying that staff privilege do not implicate antitrust concerns and such reasons are supported by substantial evidence. Likewise, a hospital may properly discharge a physician it believes to be incompetent, regardless of any collateral effect on competition. Whether there is substantial evidence to support the decision of the hospital committee to discharge a physician or to deny staff privileges to that physician is a question of law for reviewing court, and the resolution of that question need not await trial.

> Thus we hold that in order to withstand a summary judgment motion on section 1 claims alleged to arise out of a hospital's decision to terminate a plaintiff physician's staff privilege, the plaintiff must demonstrate on the basis of the record before the hospital at the time of its decision, [12] that the hospital lacked substantial evidence in support of its ultimate decision. Only then will a question of fact be raised as to the reasons for the hospital's actions.

Pontius v. Children's Hospital, 552 F. Supp. at 1372.

The *Pontius* court further explained the application of the substantial evidence rule in cases involving the termination of staff privileges:

> If a hospital decides, following a hearing which meets the requirements of due process, to terminate a physician's staff privilege for reasons valid under the antitrust laws, and those reasons are supported by substantial evidence, no factual question remains as to section 1 claims—the "restraint" is a reasonable one. If, on the other hand, the hospital's decision is not supported by substantial evidence, or the procedure used to reach the decision is substantially defective a question of fact will be presented as to the reasons for the privilege decision. It is important to note that a mere showing that the reasons advanced by the hospital are not supported by substantial evidence will not prove a plaintiff's case for him. Such a plaintiff will [13] still have to prove that the hospital's decision was motivated by an anticompetitive reason rather than a legitimate one.

Id.

In the instant case we are concerned with the revocation of Plaintiff's staff privileges which occurred in June, 1977, and the refusal of the hospital thereafter to grant Dr. Miller staff privileges. The termination of Dr. Miller's staff privileges in 1977 was based on the quality of medical care which Dr. Miller provided, as well as Dr. Miller's inability to get along with other doctors, nurses, and hospital personnel. The Hospital's decision to refuse to grant Dr. Miller staff privileges in the following years was based on the previous termination of the staff privileges and the affirmance of that termination by the courts of Pennsylvania. The issue of Dr. Miller's competency has thus been previously litigated, and it remains for this court to determine whether the Hospital's revocation of Dr. Miller's staff privileges was supported by substantial evidence. It does not appear

that this issue has been previously addressed by the Pennsylvania courts.

The Superior Court of Pennsylvania noted that although there were *de minimus* deviations from the Hospital bylaws in the [14] Hospital proceedings, the witness list provided to Dr. Miller was not so inaccurate as to preclude him from preparing for the proceedings, and the list of charges against Dr. Miller was sufficiently precise and contained summaries of the evidence to be used to support each of the charges. The Superior Court concluded that the proceedings were in accordance with the provisions of the Hospital bylaws. *Miller v. Indiana Hospital*, 419 A.2d at 1193-94.

Dr. Miller contended that the findings against him were based solely on hearsay evidence, and were thus not properly supported. However, the Superior Court found the use of hearsay evidence in the administrative proceeding to be proper, and further found that the hearsay evidence was offered in support of other admissible evidence. *Id.* at 1194. The Court also found that the past annual reappointment of Dr. Miller to the hospital staff did not indicate the Hospital's intent to ignore the cumulative effect of Dr. Miller's prior misconduct. The prior misconduct may not have warranted denial of reappointment in any one year, but the cumlative effect of it could have warranted Dr. Miller's dismissal. *Id.*

The Superior Court declined to pass on Dr. Miller's contentions that he was denied his Fourteenth Amendment right to due process, holding that the action of the Hospital did not invoke the [15] protections of the Federal Constitution and Dr. Miller's claims of unfairness in the revocation proceedings were therefore evaluated according to the standards set forth in the hospital bylaws, which constituted the contract between the parties. *Id.* at 1195. Specifically, Dr. Miller claimed

that one of the hearing officers was prejudiced against him; that the Executive Committee did not sufficiently investigate the charges against him; that the Executive Committee failed to produce essential witnesses; and that the charges were unduly vague and indefinite. The Court found that the hospital procedure afforded Dr. Miller comprehensive safeguards, including written notice, an opportuntiy to be heard, the right to counsel, the right to presentation of witnesses, and the right of cross examination of witnesses, and that Dr. Miller was dismissed fairly, impartially, and in accordance with hospital bylaws. *Id.* at 1196.

While this Court has before it the Final Recommendation of the Executive Committee as well as the Report of the Hearing Committee (*See* Exhibit A to Hild Affidavit), this Court does not have before it the record of the proceedings of the hearing held at the Hospital in June of 1977. The question of whether the Hospital's stated reasons for terminating Dr. Miller's staff privileges are supported by substantial evidence was not considered previously by the Superior Court, and this Court must [16] therefore consider the matter, however, that consideration must await the receipt of the transcript of those proceedings. If this Court, upon careful examination of the evidence before the Hearing Committee does find that the charges made by the Hospital were supported by substantial evidence, then it would be proper to grant the Defendants' Motion for Summary Judgment. At this time, then, all motions for summary judgment must be denied, however, the parties may submit renewed motions for summary judgment at the time the transcript of the 1977 proceedings are produced for this Court.

An appropriate Order will be entered.

PAUL A. SIMMONS
United States District Judge

[17] IN THE
UNITED STATES DISTRICT COURT
For the Western District of Pennsylvania

Civil Action Number 81-1091.

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a corporation; HENRY F. HILD; DONALD F. SMITH; WILLIAM R. McMILLEN; JOHN S. SIMPSON; THOMAS S. BARBOR; SAMUEL W. JACK, JR.; MRS. C. FRED HILDEBRAND; MRS. WANDA M. WEYANDT; HARRY C. McCREARY; C. WILMER JOHNSTON; GEORGE M. EVANS; DONALD S. BRODY; ROGER J. RESCHINI; JOSEPH KOVALCHICK; WILLIAM G. EVANS, M.D.; MELVIN C. WILLIAMS, M.D.; ROBERT G. GOLDSTROHM, M.D.; DAVID C. HUGHES, M.D.; RALPH F. WALDO, M.D.; HERBERT L. HANNA, M.D.; RICHARD N. FREDA, M.D.; FRANK WEINGER, M.D.; HENRY MITCHELL, M.D.; RALPH R. BROWN, M.D.,

Defendants.

ORDER

AND NOW, this 10th day of February, 1986, after consideration of the Motions for Summary Judgment filed in the above-captioned case, and after consideration of the issues, briefs [18] and contentions of the parties,

and for the reasons previously set forth in the accompanying Opinion, IT IS ORDERED that the Motions for Summary Judgment be and the same are hereby DENIED.

IT IS FURTHER ORDERED that the Defendants shall submit to this Court, within 45 days of the date of this Order, this transcript of the proceedings held in June of 1977 by the Indiana Hospital Hearing Committee. All parties shall submit renewed Motions for Summary Judgment at that time, as well as briefs in support. The parties shall have 20 days thereafter to file responsive briefs. If oral argument on the renewed Motions is requested by the parties, such argument will be scheduled at a later date.

PAUL A. SIMMONS
United States District Judge

cc:

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[1191] **Appendix G—Opinion of the Superior Court of Pennsylvania**

MILLER v. INDIANA HOSPITAL
Cite as, Pa.Super., 419 A.2d 1191

Superior Court of Pennsylvania.

Ralph J. MILLER, M. D.,

Appellant,

v.

INDIANA HOSPITAL, a Pennsylvania Corporation.

Argued April 10, 1979.

Filed April 3, 1980.

Reargument Denied Aug. 12, 1980.
Petition for Allowance of Appeal
Denied Oct. 1, 1980.

Doctor obtained a preliminary injunction ex parte from the Court of Common Pleas, Indiana County, Civil Division Equity, No. 35EQ1977, Handler, J., preventing revocation of his active staff privileges at hospital and the Court later dissolved the preliminary injunction and denied a permanent injunction and the doctor appealed. The Superior Court, No. 1221 April Term, 1978, Hoffman, J., held that: (1) findings against doctor in hearing before hospital committee were not inadequately supported, despite doctor's contention that they were based solely upon hearsay evidence, where the staff bylaws provided that any relevant evidence should be

admitted, regardless of its admissibility in court, the evidence upon which hearing committee relied included oral admissions by doctor, letters written by him and hospital records, all of which would be admissible in court, and the hearsay evidence which was allowed at hearing was offered merely in support of other admissible evidence; (2) doctor did not sustain his burden of showing that the hospital was a quasi-public agency; thus hospital's revocation of staff privileges did not constitute state action so as to call into play protections of Federal Constitution; and (3) doctor's staff privileges were revoked in fair and impartial manner in accordance with hospital bylaws and doctor was not entitled to injunctive relief.

Decree affirmed.

1. Hospitals—6

Staff bylaws of hospital constitute terms of legally binding contract between hospital and doctors on its staff and hospital must strictly comply with bylaws.

2. Hospitals—6

Hospital did not breach its contract with staff doctor by commencing proceeding regarding revoking of his staff privileges, even though proceedings were initiated upon receipt of complaint letter rather than upon formal request for revocation, where any error was cured by subsequent formal request for revocation referring to the letter and doctor was not prejudiced.

3. Hospitals—6

Hospital did not breach provisions of staff bylaws requiring that physician be provided with list of witnesses and of charges against him when revocation of

his staff privileges is sought, where witness list was not so inaccurate as to preclude doctor from properly preparing for proceedings against him and list of charges was not only sufficiently precise, but contained summaries of evidence to be adduced in support of each charge.

4. Hospitals—6

Findings against doctor in hearing before hospital committee on request for revocation of his staff privileges were not inadequately supported, despite doctor's contention that they were based solely upon hearsay evidence, where the staff bylaws provided that any relevant evidence should be admitted, regardless of its admissibility in court, evidence upon which hearing committee relied included oral admissions by doctor, letters written by him and hospital records, all of which would be admissible in court, and the hearsay evidence which was allowed at hearing was offered merely in support of other admissible evidence.

5. Hospitals—6

Hospital did not waive any objections to staff doctor's earlier misconduct by annually reappointing him to medical staff and, in proceedings concerning revocation of active staff privileges, it was proper for [1192] hospital committee to consider prior misconduct which may not have been so egregious in any one year as to warrant denial of reappointment to staff, but the cumulative effect of which called for his dismissal.

6. Hospitals—6

In action against hospital challenging its revocation of doctor's active staff privileges, doctor did not sustain his burden of showing that the hospital was a quasi-public agency, so that hospital's revocation of staff privileges did not constitute state action and did not call into play protections of Federal Constitution. U.S.C.A. Const. Amends. 5, 14.

7. Hospitals—6

In absence of hospital's staff bylaws conferring on staff doctor, in proceedings to revoke his staff privileges, a right to remove hearing officers because of possible ill-will towards him, the revocation proceedings were not rendered unfair, even if one of hearing officers was prejudiced against doctor.

8. Hospitals—6

Doctor was dismissed from staff of hospital in fair and impartial manner in accordance with hospital bylaws and was not entitled to injunctive relief, where he received written notice, opportunity to prepare and be heard, right to counsel, right to present witnesses and to cross-examine, stenographic transcription of proceedings, and appeal of right to board of directors.

9. Hospitals—6

Findings of hospital hearing committee as to death of patient of doctor whose staff privileges at hospital were revoked would not be reversed upon mere allegation of doctor that more witnesses testified for him than against him in the hearing.

John A. DeMay, Pittsburgh, for appellant.

Stewart M. Flam, Pittsburgh, for appellee.

Before CERCONE, President Judge and WIEAND and HOFFMAN, JJ.*

HOFFMAN, Judge:

Appellant's contentions may be summarized as follows: (1) appellee hospital breached its contract with appellant by failing to comply with those provisions of its bylaws governing the revocation of active staff privileges; (2) the findings of appellee's hearing committee were based upon hearsay evidence and were, therefore, not properly supported; (3) the annual reappointment of appellant to the hospital staff constituted a waiver of objections to prior misconduct; (4) appellee violated appellant's procedural due process rights under the Federal Constitution; and (5) appellee violated appellant's substantive due process rights under the Federal Constitution. We find appellant's contentions to be without merit and, accordingly, affirm the decree of the court below denying injunctive relief.

On February 16, 1977, Joseph White, a patient who had been under the care of appellant, Dr. Ralph Miller, died at the Indiana Hospital, appellee in this case. The following day, Dr. M. C. Williams sent a report to Dr. Richard Freda, the president of the medical staff, in which he stated that the quality of care which appellant had rendered to Mr. White was "below that which should be acceptable in any hospital." On February 22, 1977, Dr. Freda sent a letter to appellant inviting him to attend a meeting of the Executive Committee pursuant

* Judge DONALD E. WIEAND is sitting by special designation.

to the Indiana Hospital Staff Bylaws[1] regarding the charges which had been made against him. On February 24, 1977, Dr. Williams sent another letter to the Executive Committee formally requesting that action be taken to suspend appellant's staff [1193] privileges. This letter cited additional instances of inadequate care provided by appellant. On February 26, 1977, the Executive Committee held an informal meeting which appellant attended. Appellant refused to discuss the charges against him and left the meeting abruptly. On March 18, 1977, the Executive Committee sent written notice to appellant of its determination to recommend to the Board of Directors of the hospital that his active staff privileges be revoked. Appellant demanded a hearing and indicated his intention to exercise his rights to defend himself in accordance with the bylaws. Consequently, the Committee informed appellant of the hearing date and provided him with a list of charges against him and a list of proposed witnesses. The list of charges went beyond those included in the original complaint letter and request for revocation. In the interim, appellant requested that the Executive Committee appoint an impartial ad hoc committee to conduct the hearing because he viewed the Executive Committee as hostile and biased against him. The

[1] The relevant portion of the Bylaws provides:

> Within 10 days following the receipt of a request for action the Executive Committee shall take action upon the request. The affected individual shall be permitted to make an appearance before the Executive Committee prior to its taking action on such a request. This appearance shall not constitute a hearing, shall be preliminary in nature, and none of the procedural rules provided in these bylaws with respect to hearings shall apply. A record of such appearance shall be made by the Executive Committee.

Indiana Hospital Staff Bylaws Article IV, part C, §2(a).

Committee denied the request and held a hearing beginning on June 15, 1977, and continuing for several days thereafter.[2] The hearing committee consisted of three members of the medical staff and one member of the dental staff. Both parties were represented by counsel. The hearing officer presiding over the proceedings was counsel to the hospital. The hearing committee recommended the revocation of appellant's staff privileges. The Executive Committee adopted the recommendation and appellant took an appeal to the hospital Board of Directors. After an adversary hearing, a committee of four directors affirmed the determination of the Executive Committee and the full board adopted their recommendation. On October 14, 1977, appellant obtained a preliminary injunction ex parte from the Court of Common Pleas of Indiana County, preventing revocation of his staff privileges. The court dissolved the preliminary injunction on February 9, 1978, and denied a permanent injunction on June 29, 1978. From that denial, appellant appeals to this Court.

[1] The staff bylaws of a hospital constitute the terms of a legally binding contract between the hospital and the doctors on its staff. *Berberian v. Lancaster Osteopathic Hospital Association*, 395 Pa. 257, 149 A.2d 456 (1959). The hospital will, moreover, be held to a standard of strict compliance with its bylaws. *Id.* Thus, in *Berberian*, where appellant was removed from the hospital staff without notice or a hearing, contrary to the provisions in the bylaws, our Supreme Court enjoined the hospital from removing appellant until those requirements were met.

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[2] The extensive notes of testimony of that hearing cover 1493 pages.

[2, 3] In the instant case, appellant contends that the hospital breached its contract with him by improperly commencing the proceedings against him, by providing him with an inaccurate witness list, and by filing an unduly vague list of charges against him. Appellant alleges that because Dr. Freda initiated proceedings against him upon receipt of a complaint letter rather than upon a formal request for revocation, the Executive Committee lacked "jurisdiction" to hear his case. The bylaws confer no right upon appellant to obtain disclosure of the request for revocation of his privileges. This alleged error in commencement of the proceedings against Dr. Miller was cured by Dr. Williams' subsequent formal request for revocation referring to his earlier letter and resulted in no prejudice to appellant. Appellant also contends that the hospital breached those provisions of the [1194] staff bylaws requiring that he be provided with a list of witnesses and of the charges against him. However, the witness list was not so inaccurate as to preclude appellant from preparing properly for the proceedings against him. Finally, the list of charges was not only sufficiently precise, but contained summaries of the evidence to be adduced in support of each of the charges. Such de minimis deviations from the provisions of the hospital bylaws are not the sort of impermissible breach contemplated by the Court in *Berberian* when it established the requirement of strict compliance with staff bylaws.

[4] Appellant next contends that the findings against him were based solely upon hearsay evidence and were consequently not properly supported. "It is well established that hearsay evidence supportive of other evidence may be admitted in proceedings before *administrative agencies.*" *Board of Public Education of the School District of Pittsburgh v. Pyle,* 37 Pa. Cmwlth.

386, 392, 390 A.2d 904, 907 (1978) (emphasis added). Accordingly, in an even less formal hearing before a hospital committee, rules of evidence need not be so stringently applied as in a trial. The Indiana Hospital Staff Bylaws provide that "any relevant evidence shall be admitted . . . if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence in a court of law." Indiana Hospital Staff Bylaws, Article VII, Part C §7. As the lower court noted, the evidence upon which the hearing committees relied included oral admissions by appellant, letters written by appellant, and hospital records, all of which would be admissible in court. The hearsay evidence which was allowed at the hearing was offered merely in support of other admissible evidence. Appellant's contention is, consequently, without merit.

[5] Appellant next contends, without citation to authority, that the hospital has waived any objections to appellant's prior misconduct by annually reappointing him to the medical staff. "A waiver in law is the act of *intentionally* relinquishing or abandoning some known right, claim or privilege." *Brown v. Pittsburgh*, 409 Pa. 357, 360, 186 A.2d 399, 401 (1962) (emphasis in original). Further, "the doctrine of implied waiver in Pennsylvania applies only to situations involving circumstances equivalent to an estoppel, and the person claiming the waiver to prevail must show *that he was misled and prejudiced thereby.*" *Id.* at 361, 186 A.2d at 401 (emphasis in original).

Merely reappointing appellant annually to the staff did not indicate an intention on the part of the hospital to ignore the cumulative effect of appellant's prior misconduct. Appellant has neither alleged nor proven

any reliance upon the assumption that the actions of the hospital constituted a waiver. It was therefore proper for the hospital committees to consider prior misconduct which may not have been so egregious in any one year as to warrant denial of reappointment, but the cumulative effect of which called for appellant's dismissal from the staff.

Finally, appellant contends that he was denied his right to due process of law under the Fourteenth Amendment to the Federal Constitution. The Fourteenth Amendment "applies only to 'state action' and not to private conduct." *Adler v. Montefiore Hospital Association of Western Pennsylvania*, 453 Pa. 60, 68-69, 311 A.2d 634, 639 (1973). The actions of public hospitals clearly constitute state action for purposes of Fourteenth Amendment due process. *Id.* at 70, 311 A.2d at 640. In addition, private hospitals with certain public characteristics, so-called "quasi-public" hospitals, are deemed to be engaged in state action. *Id.* Appellant asserts that the due process standard must be applied in evaluating the propriety of his dismissal because the Indiana Hospital is a quasi-public hospital.

Our Supreme Court has stated in dicta that there are two categories of quasi-pub- [1195] lic hospitals: (1) those which receive tax benefits, are funded mainly from public sources, and hold a monopoly in the area they serve, and (2) those which receive construction funds from the federal government under the Hill-Burton Act.[3] *Id.* at 70-71, 311 A.2d at 639-640. The Court relied upon a series of cases from the Fourth Circuit Court of Appeals and one case from the Eastern District of Pennsylvania in formulating the second test of state action. *Id.* at 71, 311

[3] Hospital Survey & Construction Act, 42 U.S.C.A. §291 *et seq.* (Supp. 1970).

A.2d at 640 (citing *Sams v. Ohio Valley General Hospital Assoc.*, 413 F.2d 826 (4th Cir. 1969); *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964); *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963); *Citta v. Delaware Valley Hospital*, 313 F.Supp. 301 (E.D.Pa.1970)). Subsequently, however, in declining to apply the second test, the Third Circuit Court of Appeals has noted that "[t]he majority of circuits have held the receipt of Hill-Burton funds, Medicare and Medicaid payments and the usual hospital licensing provisions do not constitute state action." *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3d Cir. 1978) *affirming* 433 F.Supp. 281 (E.D.Pa.1977) (citations omitted). *See also Holton v. Crozer-Chester Medical Center*, 419 F.Supp. 334 (E.D.Pa.1976), vacated because of after-discovered evidence, 560 F.2d 575 (3d Cir. 1977); *Acosta v. Tyrone Hospital*, 410 F.Supp. 1275 (W.D.Pa.1976); *Hoberman v. Lock Haven Hospital*, 377 F.Supp. 1178 (M.D.Pa.1974); *Slavcoff v. Harrisburgh Polyclinic Hospital*, 375 F.Supp. 999 (M.D.Pa.1974); *Ozlu v. Lock Haven Hospital*, 369 F.Supp. 285 (M.D.Pa.1974). We therefore conclude that if presented with the issue today, our Supreme Court would not apply the second test of state action articulated in *Adler*. The federal courts look to the specific facts and circumstances of each case in order to determine whether the state is so involved in the affairs of the hospital as to render the action of the hospital that of the state. *See, e. g., Hoberman v. Lock Haven Hospital, supra* at 1188; *Ozlu v. Lock Haven Hospital, supra*, at 287. Similarly, we will employ the first, more fact-sensitive standard articulated by the Court in *Adler* in making our determination.

[6] Appellant alleges that the hospital receives funds under the Hill-Burton Act, as well as from other public sources, and that "there is no denial that Indiana

Hospital is the sole hospital in Indiana County and, therefore, holds a monopoly in the area." Appellant's Brief at 14. These bare allegations are insufficient to prove the requisite inextricable relationship between the hospital and the state. Appellant has not made an affirmative showing of the extent of the funds actually received by the hospital from the state and federal governments nor has he adduced sufficient evidence to prove that the hospital holds monopoly status in the region. Accordingly, appellant has not sustained his burden of showing that Indiana Hospital is a quasi-public agency. We cannot conclude on such a record that the action of the hospital in revoking appellant's staff privileges constituted state action so as to call into play the protections of the Federal Constitution. Consequently, we decline to judge appellant's claims of unfairness against the due process clause; rather we will assess these claims according to the standards set forth in the contract between the parties, *i. e.*, the hospital bylaws.

[7] Appellant raises several contentions regarding the fairness of the revocation proceedings: (1) that one of the hearing officers was prejudiced against him; (2) that the Executive Committee did not sufficiently investigate the charges against him; (3) that the Executive Committee failed to produce essential witnesses; and (4) that the charges were unduly vague and indefinite. The staff bylaws confer no right on appellant to remove hearing officers because of possible ill-will towards him. We therefore find no merit in appellant's first contention. The bylaws do provide that the [1196] Executive Committee shall investigate any request for revocation of privileges. Indiana Hospital Staff Bylaws, Article IV, Part B §2. Because the charges against appellant were

supported by sufficient evidence, however, the claim that the hospital committee failed adequately to investigate the charges is frivolous. Similarly, the failure of the hospital to call certain witnesses was not an unfair procedure, but merely a fact to be considered in determining whether the hospital had sustained its burden of proof. We have previously addressed appellant's contention that the list of charges was vague and reiterate here that the list was sufficiently specific to meet the goal of permitting appellant to prepare his defense in an informed manner.

[8, 9] Contrary to appellant's contentions, the hospital procedure afforded him comprehensive safeguards including: written notice, an opportunity to prepare and to be heard, a right to counsel, a right to present witnesses and to cross-examine, stenographic transcript of the proceedings, and an appeal of right to the Board of Directors. We therefore conclude that appellant was dismissed in a fair and impartial manner in accordance with the hospital bylaws and is not entitled to injunctive relief.[4]

Decree affirmed.

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[4] Appellant also contends that the findings of the hearing committee with respect to the death of Joseph White were against the weight of the evidence. While professing to recognize that "the outcome of any case cannot depend upon the mere numbers of witnesses called by one side or the other," Appellant's Brief at 42, appellant bases his argument upon the fact that few expert witnesses testified against him while many experts testified for him. The weight to be accorded the testimony of the experts was an issue for the finder of fact. We will not reverse that finding upon the mere allegation that more witnesses testified for appellant than against him.

Appendix H—Adjudication and Decree of the Court of Common Pleas of the County of Indiana, Commonwealth of Pennsylvania

JOHN A. DE MAY, ESQ.

IN THE COURT OF COMMON PLEAS
OF THE COUNTY OF INDIANA
COMMONWEALTH OF PENNSYLVANIA

Civil Division

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a Pennsylvania Corporation,

Defendant.

No. 35 EQ 1977
EQUITY

ADJUDICATION AND DECREE

HANDLER, P. J.

Until October 7, 1977, plaintiff held active staff privileges as a urologist on the medical staff of the defendant-hospital. On that date, as the result of action taken by the Executive Committee of the medical staff and the Board of Directors of the hospital, initiated February 22, 1977, his staff privileges were revoked.

Permission was granted by the defendant to continue treatment of certain of his patients until their date of discharge which was October 14, 1977 at 5 P.M.

On October 14, 1977, plaintiff was granted a preliminary injunction ex parte. The preliminary injunction was thoroughly aired before this Court on the respective motions of the parties: the plaintiff to continue the injunction and the defendant to dissolve the injunction. This Court dissolved the injunction by decree dated February 9, 1978. The decree was accompanied by a lengthy opinion of this Court which set out in detail the facts and addressed itself to a determination of the contentions of the parties. Insofar as the opinion inquires into the right to a preliminary injunction, it has no application, but insofar as it deals with matters determinative of plaintiff's request for relief in the form of a permanent injunction, it is to be considered as a part of this adjudication and will be referred to as the first opinion. Since the background facts are outlined in the first opinion, there is no need to burden this adjudication with a further repetition of them. As to the legal contentions of the parties, those which in the judgment of this Court have been adequately considered in the first opinion will not be discussed at length in this adjudication.

The pleadings, though lengthy, can be reduced to a relatively small number of claims on the part of the plaintiff answered by the defendant which constitute the contentions of the parties or issues in this case and are as follows:

1. That the action of the defendant-hospital constituted state action and therefore, plaintiff was entitled to both procedural and substantive due process.

2. That the plaintiff was denied procedural due process because (a) the hearing committee was partial and biased against him, (b) that the hearing officer was and is presently counsel for the hospital which resulted in her being a prosecutor as well as the judge, (c) that the denial of the plaintiff's request that the recommendation of the Executive Committee be heard by a specially constituted ad hoc committee was improper, (d) that the burden of proving his innocence was placed on the plaintiff, and (e) that his appeal to the Board of Directors of the hospital was heard by a committee rather than by the entire board.

3. That the defendant-hospital did not comply with those provisions of its by-laws governing the revocation of active staff privileges of a member of the medical staff.

4. That the findings of the hearing committee are based on hearsay evidence and therefore insupportable.

5. That the defendant was denied substantive due process because (a) the findings of the hearing committee are based on hearsay evidence and therefore insupportable, and (b) the action of the defendant-hospital arbitrarily interferes with the plaintiff's right to engage in a lawful occupation.

The defendant-hospital replies in the following manner:

1. That it is a private hospital, and even though it receives Hill-Burton funds, the record does not support the claim that its action constitutes state action.

2. That the plaintiff, upon accepting staff privileges, makes himself subject to all of the rules and regulations governing the staff.

3. That its conduct in dismissing the plaintiff from the staff was in compliance with the by-laws governing the staff and particularly those relating to deprivation of staff privileges.

4. That the reasons for dismissal, all of which related to the obligation of the hospital to provide medical care of the highest standard for patients and to fulfill the purpose of the by-laws of the medical staff to insure a high quality of medical care in the hospital, were supported by the weight of the substantial and credible evidence.

5. That at best, the plaintiff's claim to membership on the staff of the defendant-hospital is a privilege, the right to which is far outweighed by the public interest in the defendant hospital delivering quality medical care of the highest standard.

II. *Findings of Fact*

It is significant in this case that although the remedy requested is on the Equity side of the Court in the form of an injunction, it is really an appeal from the determination of the Board of Directors of the defendant-hospital, an administrative body vested with broad discretion to maintain and operate the hospital. Further, as an administrative body, it is either subject to the rules governing a public administrative agency or those governing a private administrative body depending upon whether its action is state action or not. This matter and the related question of whether or not it really makes any difference, in the light of the by-laws of the hospital and the medical staff, will be considered along with the other legal questions raised in the discussion.

The principles governing judicial review of an administrative agency or body clearly create a limited review. In reviewing the determination of the governing body of a hospital, it has been stated in Guerrero vs. Burlington County Memorial Hospital, 360 A 2nd 334 (N.J.):

> "On such occasions [appeal] a reviewing court should confine its effort to determining whether the decision made by the hospital is supported by substantial credible evidence and is neither arbitrary nor capricious. When a decision fulfills these requirements, a reviewing court should refrain from substituting its own judgment for that of the hospital authorities."

This principle is the same as that applicable to appeals from the determination of a public agency. Where a statute confers discretion upon an administrative tribunal, its actions are subject to judicial review only to determine whether or not (a) findings of fact are supported by substantial evidence, (b) there has been an abuse of discretion, or (c) a purely arbitrary exercise of authority. Judicial discretion may not be substituted for administrative discretion so that it is improper to reverse an administrative action for the reason that the Court may have reached a different opinion or judgment in a particular case. Slanina vs. Sheppard, 27 Cmwlth Ct. 376; Williams vs. Civil Service Commission, 457 Pa 470. Substantial evidence is that relevant evidence a reasonable mind can accept as adequate to support a conclusion. The reviewing court will not weigh conflicting testimony or judge the weight and credibility of the evidence, Bovine vs. Indiana Area School District, 377 A 2nd 1284 (Cmwlth Ct).

These ruling principles set out the guidelines for the action of this Court in this case. Its Findings of Fact and Conclusions of Law must be directed toward whether or

not there has been compliance with these guidelines by the governing body of the hospital; and based thereon, we find as follows:

1. Indiana Hospital is a non-profit hospital corporation organized under the laws of the Commonwealth of Pennsylvania. It is governed by a charter, its by-laws of the medical staff promulgated under the authority of the hospital by-laws.

2. The by-laws of the hospital and of the medical staff clearly state the reasons for which medical staff privileges may be revoked and a detailed procedure which must be followed to accomplish revocation.

3. Plaintiff has been a member of the medical staff of the defendant-hospital with privileges in surgery as a urologist for approximately 18 years, the last renewal of these privileges being for the year 1977.

4. Joseph P. White was admitted to the defendant-hospital by way of the emergency room on February 13, 1977 with a diagnosis of acute pneumonitis and hematuria. He was accepted by the plaintiff on his service and treated by the plaintiff for pneumonitis, this part of the treatment being beyond his staff privileges. He died February 16, 1977 at 8:40 P.M. from an acute circulatory arrest.

5. As a result of the handling of the case of Joseph P. White by the plaintiff, an incident report was made by Dr. M. C. Williams, a Department Head, on February 17, 1977 to the Executive Committee of the staff which set out in detail various examples of poor quality of physician management of the case and concluded with the following observation:

> "I am reporting this episode because I feel that there have been conduct, acts and omissions

detrimental to the health and safety of a patient and because the quality of care rendered is below that which would be acceptable in any hospital."

6. On February 22, 1977, the plaintiff was notified by the president of the medical staff that a meeting would be held on February 26, 1977 to consider the incident report as well as a second incident report involving another patient of the plaintiff.

7. On February 24, 1977, a formal request to suspend or revoke the staff privileges of the plaintiff was filed with the executive committee of the staff by Dr. M. C. Williams. There is no evidence that the plaintiff did not have notice of this prior to the meeting.

8. The meeting was held and attended by the plaintiff: also present were eight members of the Executive Committee. An attempt was made to discuss these several incidents, but the plaintiff refused to do so responsively, and instead interrogated each member of the committee as to whether or not he had any specific charges to make against him. The plaintiff remained at the meeting approximately 22 minutes and departed abruptly after which a motion was passed to revoke the plaintiff's total clinical privileges.

9. On March 18, 1977, plaintiff was given a written notice by the Executive Committee of its determination to recommend to the directors of the hospital that his active staff privileges be revoked. Accompanying the notice was a list of the charges on which the recommendation was based, each charge set out in specific language and containing a reference to the evidence or evidentiary material on which the charge was based.

10. On March 23, 1977, the plaintiff gave notice of his demand for a hearing and indicated his intention to exercise his right to defend himself in accordance with the staff by-laws.

11. Although a date was set for the initial hearing, a continuance was granted the plaintiff to permit him to meet with the Executive Committee for the purpose of pressing a request that a different hearing committee be appointed because he was dissatisfied with the hearing committee that had been appointed.

12. The request was denied and a second notice of intention to revoke the privileges of the plaintiff was sent to him and a hearing date set for June 15, 1977 on which date and a number of days thereafter, extensive hearings were held before a hearing committee consisting of three members of the medical staff and one member of the dental staff at which both the plaintiff and the hospital were represented by counsel.

13. Plaintiff was accorded a full and fair hearing which was in strict compliance with the procedural requirements set out in the by-laws. The essential elements of due process in administrative cases, notice, the opportunity to be heard and to defend in an orderly proceeding, adapted to the nature of the case, were present.

14. That on August 3, 1977, the hearing committee by three members filed a report of its findings and recommended the revocation of the plaintiff's active staff privileges as a member of the staff of the defendant-hospital. This recommendation was adopted by the staff Executive Committee, notice of which was given to the plaintiff.

15. In accordance with the medical staff by-laws, plaintiff filed an appeal with the Board of Directors of the hospital and was granted a hearing before the medical staff committee of the hospital consisting of four directors at which hearing plaintiff and defendant hospital were represented by counsel.

16. The medical staff committee of the hospital affirmed the determination of the staff Executive Committee which action was approved by the full board of the hospital and notice of which was given to the plaintiff by letter dated October 7, 1977.

17. The report of the hearing committee recommending revocation of the plaintiff's staff privileges and included findings of fact that seventeen of the charges filed by the Executive Committee were supported and sustained by the weight of substantial and credible evidence presented at the hearing. An examination of the record is conclusive that all of the charges are so supported except Charge No. 6 which relates to a certain incident involving Dr. Oesterling.

III. *Discussion*

No additional evidence was offered at the hearing on the permanent injunction. The case was submitted on a voluminous record made during the hearings before the hospital hearing committee, the medical committee of the hospital, the hearing on the motions to continue or dissolve the temporary injunction held before this Court and certain stipulations of counsel. Instead of offering additional evidence, counsel for each side presented extensive arguments covering most of the ground already covered in the preliminary injunction stage. For this reason, if the particular point of argument has

already been covered in the first opinion, it will be so noted and little or no further discussion will be had of it in this opinion.

Plaintiff insists that the action of the defendant hospital is state action. The receipt of Hill-Burton funds by a private hospital does not create the "symbiotic relationship" between the hospital and a state sufficient to establish that the state participated in the challenged activity, Hodge vs. Paoli Memorial Hospital, 433 F. Sup. 281 (E.D. Pa.). Neither the record in this case nor any argument made in behalf of the plaintiff convinces this Court that the defendant hospital is within the rule laid down in Braden vs. University of Pittsburgh, 552 F. 2nd 948 (3rd Cir.). Furthermore, whether or not the conduct of the hospital constituted state action is of little or no significance in this case because compliance with the staff by-laws governing the revocation of staff rights meets the criteria of due process in an administrative proceedings.

The complaint of bias or prejudice on the part of one of the members of the hearing committee was completely covered in the first opinion. Not only did the Court adequately discuss this objection, but also objections to the hearing officer, the placing of the burden of proof on the plaintiff which is not an unusual rule in administrative proceedings, the right of the plaintiff to see the actual written request for revocation of his staff privileges, the hearing of the appeal by the medical committee of the Board of Directors of the hospital consisting of four persons rather than the entire board which was in accordance with Article V, Section 4 of the by-laws of the hospital. An objection heard during both the preliminary and permanent injunction proceedings was that the defendant hospital presented an expert

witness, Dr. Arnold Sladen, whose name did not appear on its witness list. Plaintiff's counsel sought to bar his testimony completely; defendant's counsel justified the omission of his name from the witness list on the basis that (a) he was a rebuttal witness and (b) the staff of by-laws requires such disclosure within ten (10) days of the request from the other side "so far as is then reasonably known." It was not an abuse of discretion by the hearing officer to permit the testimony to be heard. Plaintiff should have anticipated that his presentation of experts would be countered by the defendant's presentation of an expert, that the expert might not be known until the precise testimony of plaintiff's experts was disclosed, and finally, if plaintiff was prejudiced or felt prejudiced, he could have requested a continuance for the purpose of obtaining a prior disclosure as to the nature of the testimony intended to be offered by the defendant's expert. Plaintiff did not request a continuance.

Plaintiff also seeks to have the Court impose the rule of Lanzetta vs. New Jersey, 306 US 451, that every enactment proscribing and penalizing certain conduct as being criminal must be sufficiently clear in its language to provide adequate notice to any person who might engage in that conduct; otherwise, the due process clause of the Fourteenth Amendment is offended. Thus, he argues that the charges are unconstitutionally vague and indefinite. In assuming this position, he errs in at least two respects. First, he is not being penalized for criminal acts emanating from his conduct as a member of the staff of the defendant hospital. As a licensed physician and a member of the staff, the hospital and staff by-laws as well as the standards of medical practice advise him what conduct is acceptable and what conduct is not acceptable. If he likens the charges to an indictment (which they aren't), they are more than ample

to afford him knowledge sufficient to defend himself because each charge is not only set out in detail but the evidentiary material on which it is based is referred to in it.

The element of previous accreditation was adequately treated in the first opinion. The finding of the appropriate committee of the medical staff that a staff member is entitled to be accredited for the subsequent year is simply a finding that there is nothing in his conduct during the past year which should deny him accreditation. It does not condone or forgive derelictions during that year. This is not unusual in administrative proceedings relating to tenure in an appointive position. In the police civil service cases, the prior service record of a police officer, including the adjudication and penalty for a previous offense, may be substantively considered in imposing the penalty which might be imposed in the case under consideration, In Re: Ditko's Appeal, 385 Pa 435.

Much has been made by the plaintiff about the evidence on which the findings of the defendant-hospital are based. The validity of this argument was adequately discussed by this Court in the first opinion. Plaintiff is particularly critical of a quality of the evidence, asserting that most of it is hearsay. In this regard, what is labelled hearsay must be measured by the staff by-laws (to which the plaintiff subjects himself upon becoming a member of the staff) as well as the legal definition of hearsay evidence. The staff by-laws provide that any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs regardless of the admissibility of such evidence in a court of law. The evidence on which the hospital based its findings certainly not only meets

this standard but goes beyond because it consists of legally admissible evidence in the form of hospital records, statements made by the plaintiff during the hearings and admissions made by the plaintiff in letters written by him or for him. It is to be noted that this court found one charge relating to Dr. Oesterling as not being based on proper evidence because it fell below either standard applicable in this case.

The incident which triggered the action of the defendant hospital was the treatment of Joseph P. White by the plaintiff from February 13, 1977 until February 16, 1977. Plaintiff relies heavily on the "numbers" aspect of the expert testimony offered in his behalf to support his contention that there was nothing improper about the manner in which he treated the patient. Of course, numbers have nothing to do with the weight of the evidence. Furthermore, the fact-finder is not bound by the opinion of an expert, whatever his expertise. Expert testimony is to be considered with the other evidence and may be rejected in whole or in part. The weight to be given to such evidence is for the fact-finder, Freed vs. Priore, 372 A 2nd 895 (Super Ct). An analysis of the expert medical testimony offered in behalf of the plaintiff indicates that its factual basis was the hospital records. At least one of the experts on the issue of whether an additional consultation should have been ordered relied on the discharge summary written by the plaintiff on March 3, 1977, approximately three weeks after the patient died which contains the statement that a consultation was offered but declined. A member of the patient's family testified that she inquired about a consultation and was told by the plaintiff that no consultation was necessary. Since all of the evidence was to be weighed by the fact-finders, their finding on this particular element of the case which indicated a disregard for the plaintiff's experts is totally logical.

The total pattern of the plaintiff's conduct as a member of the staff of the defendant hospital as reflected in the evidence and on which the findings were made support the objective conclusion of the defendant-hospital that its ability to fulfill its obligation to the community in maintaining the highest standards of medical care for its patients was being unreasonably hampered and was placed in jeopardy. But even more important in the opinion of this Court are the reasons for the plaintiff's conduct. By his own admission, he does not consider the vast majority of his staff colleagues and the Department Heads his peers; he believes his capabilities are superior to theirs. Although he stated that he did not believe a consultation for Joseph P. White was necessary, he also stated that he did not believe that any of the staff members who were internal medicine specialists were competent, that the general practitioners on the staff had the least competency but were able to do the most. He spoke disparagingly of the emergency services of the hospital, strongly implying that the personnel assigned were incompetent, and the procedures faulty. He did not read the nurses' notes because they were full of errors. He indicated that he had no respect for the nursing staff and that only a supervising nurse was competent to make rounds with him. He refused to function in a staff assignment unless things were done precisely in the manner suggested or requested by him. He altered hospital records for the purpose of indicating that he was right in all instances. He was unable to accommodate himself to administrative actions of the Board and the administration by entering into a reasoned discussion with a responsible person, but on the contrary, charged the action to some sort of a cabal constantly conspiring to undermine him. He was penalized by the Pennsylvania Department of Health for

violating the law and regulations relating to the treatment of indigents. Under the program he had the option of refusing to treat indigents, or if he treated them, billing the Department of Public Welfare in accordance with their rules. He excused his non-conformance by simply stating that he did not participate in the program and upon being notified of his right to a hearing on the penalty imposed, responded by having his counsel write a "lawyer's letter" to the Secretary of the Department of Health strongly implying that if there was a continued interference with the plaintiff's ability to regard the law as he interpreted it—non-participation, there would be a suit. This affected the administration of the hospital because patients requiring urological treatment were referred to him on a rotation basis and some of them were indigent.

The incident involving the other urologist on the staff, Dr. Park, is significant not because the letter which the plaintiff wrote to the Board of Urology contained statements from which there might be inferred a denigration of Dr. Park. The letter together with statements made by the plaintiff in testimony create a compelling inference that the plaintiff would under no circumstances work with Dr. Park, a colleague, in his own specialty. Although the plaintiff stated that he cooperated with Dr. Park, he also declined working with him. In fact, there is no evidence in the record that the plaintiff ever even spoke to Dr. Park to the extent of giving him the time of the day. It naturally follows that they did not cover for each other. The argument that the hospital action deprives the community of two urologists falls flat, in the face of these facts. It is impossible for a doctor to be available at all times. It is highly desirable that hospital patients have the service of a covering

physician in the absence of the physician in charge. In this instance, there is a situation where the sum of one plus one is not two, but one.

Plaintiff contends that if he has any problems with other members of the staff and the administration, they are merely "personality problems." He admits to being critical but justifies it on the basis that *his patients deserve faultless care.* However, personality problems may rise to disruptiveness which create circumstances making it impossible for a hospital to perform its function. In a leading case on the subject, Anderson vs. Board of Trustees of Care Community Hospital, 159 NW 2nd 347 (Michigan App.), the court observed:

> "When a condition or influence exists which makes it impossible to perform its function, the administrative authority has the right and indeed the duty to correct the situation."

The same applies to the disruptive nature of hypercriticism. Although a discussion of this aspect of the case as found in Sussman vs. Overlook Hospital Association, 231 A 2nd 389 (N.J. Super) is in the first opinion, the statement of the court is especially relevant here:

> "Destructive criticism can become obnoxious and disruptive of morals and good relations."

The public demands and has the right to the best medical care available. An indispensable element of this care is the community hospital. The defendant-hospital, as all hospitals, represents a complex operation involving every management problem of a business plus the delivery of medical and nursing care of the highest standard in all its aspects from diagnosis to treatment. This cannot be accomplished without reasonable cooperation and accommodation of all persons in their

assigned positions. The plaintiff's case of mind, his unswerving belief in his superiority, his inability to conform with the rules and practices formulated for the purpose of accomplishing the objectives of the hospital, his treatment of his fellow professionals not only on a personal basis but because he has no respect for their competence, all of these strongly militate against the functions and objectives of the hospital. Under such circumstances, the hospital cannot be held powerless to remedy the situation by terminating plaintiff's staff privileges.

IV. *Conclusions of Law*

1. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges does not constitute state action.

2. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was in compliance with the by-laws of the hospital and the medical staff.

3. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was not arbitrary, capricious, or contrary to law.

4. That the conduct of the defendant-hospital in revoking the plaintiff's staff privileges was based on proper cause under the by-laws of the hospital under the medical staff and the legal powers of the governing board of the defendant-hospital in the operation of the hospital.

EARL E. HANDLER
Judge

IN THE COURT OF COMMON PLEAS
OF THE COUNTY OF INDIANA
COMMONWEALTH OF PENNSYLVANIA

Civil Division

RALPH J. MILLER, M.D.,

Plaintiff,

vs.

INDIANA HOSPITAL, a Pennsylvania Corporation,

Defendant.

No. 35 EQ 1977
EQUITY

DECREE NISI

AND NOW, June 29, 1978, in accordance with the foregoing Findings of Fact and Conclusions of Law, the plaintiff's prayer for a permanent injunction is denied, and judgment is entered for the defendant.

BY THE COURT:

/s/ EARL E. HANDLER
President Judge

Appendix I—Report of Hearing Committee

REPORT OF HEARING COMMITTEE
RE: RALPH J. MILLER, M.D.

The undersigned Hearing Committee, having been appointed by the Executive Committee of the Medical Staff of the Indiana Hospital to hear and inquire into certain charges which were presented by the Executive Committee against Dr. Ralph J. Miller, a member of the Medical Staff, has now heard and considered all of the evidence presented to the Committee, both by and in behalf of Dr. Miller and by and in behalf of the Executive Committee, said hearing having commenced June 15, 1977, and been completed July 20, 1977.

By unanimous vote, the Hearing Committee makes the following Findings with respect to the charges brought by the Executive Committee:

1.-A&B. Dr. Miller exhibited disruptive, insulting, intimidating, disrespectful, disparaging, abusive and other improper behavior toward, and repeatedly and continuously failed to cooperate with, Dr. Robert G. Goldstrohm and the Department of Surgery; this behavior was particularly manifested by his conduct at various Surgical Department Meetings, by directly inferring that Dr. Goldstrohm was not competent to serve as Chairman of the Surgical Department, that Dr. Goldstrohm had conducted a "kangaroo court", that Dr. Goldstrohm was one of the "Chief Culprits" of the Medical Staff, by inferring that Dr. Goldstrohm was one of the "sickies" of the Medical Staff, by threatening to "expose" Dr. Goldstrohm to the Board and to the

community, that there was a "conspiracy" in the election for Chairman of the Surgical Department, by his criticism of the personal hygiene of certain of the Hospital surgeons, and by other similar such behavior;

1.-C. Dr. Ralph J. Miller exhibited disruptive, insulting disparaging, disrespectful, abusive, and other improper behavior toward, and repeatedly and continuously failed to cooperate with the Executive Committee and its members, illustrated in part by his failure to appear at the May 15, 1973 meeting of the Executive Committee, which had been specially called at Dr. Miller's request, by his referring to members of the Executive Committee as "accusers", by referring to the "star-chamber like proceedings" of the Committee, by his behavior at the special Executive Committee Meeting of February 26, 1977, at which he refused to answer any questions concerning his patients, Joseph P. White and Charles Empfield, or other matters, and by his abrupt leaving, by his general showing of disdain for the authority or responsibility of the Executive Committee, all as reflected by the evidence, both oral and written;

1.-D&E. Dr. Miller exhibited insulting, disrespectful, intimidating, and abusive conduct toward Dr. Herbert Hanna, manifested by his refusal to accept the assistance offered by Dr. Hanna and his discourteous behavior exhibited toward Dr. Hanna in an emergency call situation on December 8, 1972, involving patient Ralph Spino, and by his abusive language to and

physical assault on Dr. Hanna in and about the Hospital Staff Room on or about October 5, 1971;

1.-F&5. Dr. Miller exhibited absurd, insulting, threatening, disparaging, disrespectful, intimidating, abusive, and/or other improper conduct toward, and repeatedly and continuously failed to cooperate with, Mr. Donald F. Smith, Chief Executive Officer of Indiana Hospital and the Hospital Administrator, as manifested by his letters dated April 19, 1973 and December 20, 1975 to Mr. Smith, and further, has frequently and continuously made unsupported allegations regarding Hospital activities and conditions to the Hospital's Administration and its Board of Directors, as evidenced, in part, by the above and by Dr. Miller's letter dated July 10, 1976 to Mr. Hild;

1.-G. Dr. Miller exhibited disrespectful, disparaging, insulting, and highly unprofessional conduct toward Dr. Joseph Park in connection with Dr. Park's application for certification with the American Board of Urology on or about February 1976, as evidenced by Dr. Miller's letter of January 21, 1975 to the Board of Urology and Dr. Miller's testimony with reference to his communications to the Board regarding Dr. Park;

1.-H. Dr. Ralph J. Miller exhibited disparaging, disrespectful, intimidating, threatening, insulting, and other improper and unprofessional conduct with respect to Nurse Nellie Isenberg, as exemplified by his statement

to Nurse Isenberg, working on a Saturday night, "... must interfere with your [Nurse Isenberg's] boozing parties", and by Dr. Miller's action after these proceedings had begun, of pushing up the tip of Nurse Isenberg's nose with his finger, at the same time reminding Nurse Isenberg of their long standing friendship, which friendship, Dr. Miller advised Nurse Isenberg, he hoped would continue;

1.-I. Dr. Miller exhibited disruptive, disrespectful and intimidating, and other improper and unprofessional, behavior by interrogating Nurse Sara Swisstock and by the manner of his interrogation as described in the Incident Reports submitted by Mrs. Swisstock, and as evidenced by the testimony of Nurse Swisstock and Dr. Miller;

1.-J. Dr. Miller exhibited disrespectful, threatening, intimidating, insulting, and other improper and unprofessional conduct toward Nurse Kathy Boardley, exemplified by his interrogation, and the manner of his interrogation, of Nurse Boardley in the Hospital's cafeteria on Saturday evening, March 5, 1977, as described in Nurse Boardley's Incident Report of March 5, 1977, and the testimony of Nurse Boardley, and Drs. Miller and Greene;

2. Dr. Miller failed to request a medical consultation to assist with and/or to take over the management of the treatment of Hospital patient, Joseph P. White (#320,120), under circumstances which should have clearly indicated to Dr. Miller the need for such a

consultation, based upon his discussions with members of the family, based upon the complexity of the case, and based upon the further requirement for such a consultation where the quality of medical care for the patient will be enhanced;

3. Dr. Miller failed to order, or to timely order, various standard, routine and necessary examinations, testings and laboratory work incidental and necessary for proper medical management of patient Joseph P. White's respiratory condition as testified to by Dr. Arnold Sladen;

2.&3. Dr. Miller made incorrect and improper entries in the record and the discharge summary of patient Joseph P. White;

4.&11. Dr. Miller failed to comply with the order of the Bureau of Medical Assistance, Commonwealth of Pennsylvania, effective April 10, 1969, barring Dr. Miller from further participation or writing of prescriptions under the Commonwealth's Medical Assistance Program, as manifested by the April 17, 1969 letter from the Department to Dr. Miller, and by Dr. Miller's own testimony; further, at various times Dr. Miller violated Medical Assistance Rules and Regulations and Pennsylvania Law by privately billing Medical Assistance patients, referred to him on a rotation basis by the Indiana Hospital for services performed rather than applying for and accepting from the Public Administrator of the Medical Assistance Program, as his sole fee, whatever fee was established by the Program, according to fixed schedule, and/or Dr. Miller did both, that is privately billed (and collected a

fee from) such Medical Assistance patients and, at the same time, submitted invoices to and received payment from the Public Administrator of the Medical Assistance Program;

6. Dr. Miller made an improper and unprofessional comment and publication, by conducting a discussion with a layman, at which time Dr. Miller revealed confidential medical information about a certain patient's pap smear, which information was contained in Hospital Records and files, by commenting unfavorably upon the quality of such tests made at the Indiana Hospital. (See, in particular, Dr. Oesterling's letters of January 26, 1973 to the Medical Staff Executive Committee and to Dr. Miller.);

7. Dr. Miller, while serving as Chairman of the Infection Control Committee, between January 1, 1976 and June 30, 1976, failed to hold Committee meetings every two months, and failed to maintain necessary records and minutes, and otherwise report to, and cooperate with, the Executive Committee, all as required by the By-Laws and Rules and Regulations of the Medical Staff and the Indiana Hospital;

8. Dr. Ralph J. Miller failed to cooperate with the Executive Committee of the Medical Staff of the Indiana Hospital by refusing to pay proper assessments made of all Medical Staff members to support the Preceptorship Program in the year 1971;

9. Dr. Miller failed to cooperate with the Executive Committee of the Medical Staff of the Indiana Hospital by refusing to serve on the Library Committee for the year 1975.

10. Dr. Ralph J. Miller repeatedly and continuously failed to cooperate with the Hospital's Administration by not preparing and submitting complete and adequate patient medical records, within the time period required by the Medical Staff By-Laws;

The Hearing Committee finds that, based upon the aforegoing, the action of the Executive Committee in recommending revocation of Dr. Miller's Hospital Staff privileges is reasonable, is supported and sustained by the weight of substantial and credible evidence presented at the hearing, and the Hearing Committee hereby approves the Executive Committee's recommendation that the Medical Staff privileges and membership of Dr. Miller be revoked.

The Hearing Committee further finds that the evidence in support of charges 1, 2 and 3 alone would be adequate basis for endorsing the recommendation, and that while each of the other charges, taken by itself, would not warrant suspension, the cumulative effect of all of them together lends further support to the recommendation of the Executive Committee.

Respectfully submitted,

HEARING COMMITTEE:

R. R. BROWN, M.D.,
R. R. Brown, M.D., Chairman

R. P. LIPINSKI, D.M.D.
R. P. Lipinski, D.M.D.

H. A. STRUNK, D.O.
H. A. Strunk, D.O.

DATE: August 3, 1977

(2)

Supreme Court, U.S.
FILED
JUL 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2093

IN THE

Supreme Court of the United States

October Term, 1987

INDIANA HOSPITAL, *et al.*,

Petitioners,

vs.

RALPH J. MILLER, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 87-2093

INDIANA HOSPITAL, *et al.*,

Petitioners,

vs.

RALPH J. MILLER, M.D.,

Respondent.

Statement of the Case

This action arises from the ongoing concerted actions of Indiana Hospital and certain individuals (hereinafter referred to as the "Hospital") to suppress and curtail the holdings and medical services of Dr. Ralph Miller in the health care industry in Indiana County, Pennsylvania. The conduct is alleged to be in violation of the Sherman Act, 15 U.S.C. §§1 and 2, and relief therefrom is sought pursuant to the Clayton Act, 15 U.S.C. §§15 and 26. Part of the conduct at issue involves the termination of Dr. Miller's admitting and staff privileges as a urological surgeon at the Hospital in 1977, after his having held such privileges for nineteen years. Dr. Miller agrees with, and herein adopts, the statement of facts set forth in the opinion of the Court of Appeals for the Third Circuit in this case. *See, Miller v. Indiana Hospital*, 843 F.2d 139 (3rd Cir. 1988).

All parties filed cross-motions for summary judgment in the district court, which motions were denied (App. at 42). The court's opinion supporting the denials adopted the legal standard for summary judgment in antitrust cases concerning hospital staff privileges, as set forth in *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D.Pa. 1982). Under the *Pontius* standard, the trial court, without any consideration of the evidence of record demonstrating an antitrust violation, determines as a matter of law whether the hospital's stated reasons for termination are supported by substantial evidence. If so, the restraint is deemed reasonable for antitrust purposes. Also under *Pontius*, the procedures used in the termination decision must be shown not to be substantially defective.

Following the district court's initial decision, the Hospital filed a Renewed Motion for Summary Judgment (App. at 360) which was granted by the district court in its Order and Opinion of May 6, 1987 (App. at 60). While acknowledging that the hearing transcript contained evidence raising factual disputes between Dr. Miller and the Hospital, the court held that the Hospital's findings were supported by such relevant evidence as a reasonable mind might accept as adequate, *i.e.*, substantial evidence (App. at 65). The court further found that the termination process did not involve substantially defective procedures.

Dr. Miller filed a timely appeal to the United States Court of Appeals for the Third Circuit on the ground that use of the substantial evidence test as a standard for summary judgment improperly disregards the traditional and accepted requirement that the evidence and reasonable inferences therefrom of the non-moving party be accepted as true. Further, Dr. Miller contended

that this standard shifts to one of the parties in interest (the Hospital) those functions traditionally left to the jury. Additionally, application of the substantial evidence test in deciding the motion for summary judgment precluded the court from considering all the circumstances and evidence bearing on antitrust liability, in contravention of the well-settled requirements set forth by this Court and the other federal courts. Matters which Dr. Miller had placed upon the record, but which were ignored under the substantial evidence standard, included evidence that the outcome of the Hospital's termination proceedings against Dr. Miller had been predetermined by the Hospital well in advance of the hearings themselves. Further, the evidence showed that Dr. Miller was the victim of unequal treatment, as compared to other physicians, at the hands of the Hospital in the application of its standards for making staff privileges decisions. Moreover, the evidence established that the unequal treatment and predetermined outcome of the hearing were motivated by a desire to eliminate Dr. Miller as a competitor in the medical services industry in Indiana County.

The Court of Appeals accepted Dr. Miller's position that the standard used to dismiss his action was aberrant from the proper legal standard. The court did not reach the specific question of whether substantial evidence existed since, as a matter of law, that standard when used at summary judgment does not provide the usual protections of traditional summary judgment standards. The court held that the mere fact that an antitrust action involves hospitals does not warrant a deviation from traditional antitrust summary judgment standards. Accordingly, the court reversed the district court's order granting the Hospital's motion for summary judgment and remanded the case for further proceedings.

The Hospital sought a Rehearing *En Banc* on the ground that the public policy of encouraging physicians to participate in staff privilege decisions may be chilled by the application of traditional summary judgment legal standards in this context. The Court of Appeals, however, denied the Hospital's Petition for Rehearing, by Order dated April 22, 1988.

The Hospital now petitions for certiorari. Dr. Miller files the instant response in opposition to that petition.

Summary of Argument

The Court of Appeals for the Third Circuit properly reversed the summary judgment which had been entered on the basis of an aberrant legal standard for summary judgment in hospital staff privilege antitrust cases. The legal standard struck down by the Court of Appeals did not provide the same protection against unwarranted dismissals as traditional summary judgment standards and was inconsistent with the decisions of this Court.

As recently as May of this year, this Court refused to create an exemption for staff privilege decisions from the antitrust laws based on any claim that public health would be detrimentally affected. That result is specifically what the Hospital seeks in this Petition. Moreover, recent legislative enactments diminish, if not eliminate, the impact of antitrust liability in deterring peer review participation by physicians.

Reasons for Denying the Writ of Certiorari

The Hospital here has not questioned the existence of genuine issues of material fact in the case at bar, when the record is analyzed by traditional antitrust summary judgment standards. Rather, its position is that, when a hospital or physicians are defendants in an antitrust suit, a court considering a motion for summary judgment need not consider all of the factual circumstances bearing on antitrust liability. The Hospital argues that, if a hospital's reasons for terminating staff privileges are supported by substantial evidence and substantially fair procedures were employed in the termination decision, then the hospital and participants in the decision are immune from application of the antitrust laws. This is true regardless of the quantum of evidence which otherwise demonstrates the motivation of the hospital to suppress competition. No opinion of this Court or the Courts of Appeals has ever sanctioned such immunity from the antitrust laws. Other than the instant action, the only case known to Respondent abrogating traditional summary judgment standards in this context is *Pontius v. Children's Hospital*, 552 F.Supp. 1352 (W.D.Pa. 1982).

The Hospital here posits that a physician determined by the Hospital to be incompetent should not be entitled to relief under the antitrust laws especially when the Hospital's decision has been said to satisfy the substantial evidence test. Until the Court of Appeals rejected that position, no court ever considered the strong evidence in the case at bar that the Hospital's general standards for accepting and retaining physicians on staff were far exceeded by Dr. Miller. Indeed, no court had considered the evidence that Dr. Miller had

been singled out from other physicians for disparate treatment because he posed an economic threat to the Hospital and others, and not because of any claim of incompetence. The decision to remove Dr. Miller from staff had been made by the Hospital prior to the alleged conduct of Dr. Miller which formed the basis for the Hospital's claim of incompetence against him.

The application of the substantial evidence test is an inadequate summary judgment standard since it inherently does not guard against or weed out those staff privilege decisions which are in fact designed to eliminate competition in contravention of the antitrust laws. The general application of this standard of review assumes good faith on the part of the governmental agency charged with drawing a particular conclusion, and the reviewing court defers to that agency's good faith decision by not substituting its own conclusions for that of the agency.[1] The use of staff privilege termination proceedings as a means to eliminate competition in violation of the antitrust laws would remain undetected

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[1] The Hospital's decision here on Dr. Miller's incompetency is an excellent example of how the substantial evidence test does not represent a thorough review of the facts. While seven well qualified physicians testified that Dr. Miller's care of the particular patient met all acceptable medical standards, only one physician opined that it did not. That one physician testified without any advance notice having been given to Dr. Miller's counsel, as required by Hospital by-laws. As was discovered much later, that one physician failed to disclose in questioning at the hearing that he was, at the time, a client of the attorney representing the Hospital in the hearing. The Hospital relied exclusively on the opinion of this expert in finding Dr. Miller incompetent. While that finding might satisfy the substantial evidence test, other reasonable minds might discern a motivation on the part of the Hospital other than patient welfare in making that finding. Exh. Vol. 1 at 199, 252, 293, 77, 124, 149, 180; App. at 205, 206; Exh. Vol. 2 at 539; App. at 207.

under the summary judgment standards struck down by the Court of Appeals in this case. A victim of such illegal conduct should be entitled to all antitrust remedies.

In reversing the grant of summary judgment here, the Court of Appeals recognized that the standard used was not consistent with the opinions of this Court. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), it was stated as follows:

> Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. 477 U.S. at 255.

By supplanting this traditional standard with a substantial evidence test, the jury is precluded from carrying out these functions. Further, by application of the substantial evidence test, where a finding may be upheld even though reasonable minds may differ, *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 477 (1951), the court is relying on the weight of evidence and inferences as determined by the moving party. The deference which a reviewing court must give to an administrative agency decision under the substantial evidence test, *see, Universal Camera Corp., supra*, is misplaced upon the decisions made by those operating a private hospital, especially in the face of evidence of record which indicates that the outcome of the termination process was predetermined and was the result of anticompetitive motives.

The failure of the substantial evidence standard, as applied in a summary judgment proceeding, to consider the evidence of record specifically bearing on antitrust liability, including evidence of unequal treatment, a predetermined outcome and anticompetitive motives, is contrary to the requirement that a party's conduct be analyzed in light of the entire factual setting, giving consideration to all circumstances bearing on antitrust liability. *First National Bank of Arizona v. Cities Service Company,* 391 U.S. 253 (1968) and *Matsushita Electric Industrial Company v. Zenith Radio Corporation,* 475 U.S. 574 (1986).

The fact that physicians as professionals are involved in staff privilege decisions does not warrant judicially created standards exempting them from the application of the antitrust laws. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). While a ruling on certain actions of professionals may require consideration of the professional setting which differs from a purely business setting, the language of the Sherman Act does not support a Congressional intent to condone the suppression of competition by physicians and hospitals through the otherwise legal activity of peer review. *Goldfarb, supra.* The mere fact that professional conduct, whether in the form of an ethical rule precluding any customer price comparisons or peer review activities, is designed to assure quality professional services and thereby protect the public health, safety and welfare does not place such conduct beyond the reach of the antitrust laws. *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978).

The Hospital here in seeking a writ of certiorari relies heavily on the contention that the mere threat of antitrust liability will chill physician participation in peer review and will thereby diminish the quality of health care nationally. This Court has recently refused to accept this contention as a basis to depart from traditional antitrust principles as applied to hospital staff privilege decisions. *Patrick v. Burget*, 56 U.S.L.W. 4430 (May 16, 1988). In *Patrick*, the physicians were explicitly informed that such an argument is properly addressed to Congress, and not to the courts. Thus, this Court has already specifically refused to create judicially the relief the Hospital seeks here, namely an immunity from antitrust laws for medical peer review decisions.

Finally, it must be noted that Congressional action in passing the Health Care Quality Improvement Act of 1986, 42 U.S.C.A. §§11101 *et seq.*, undermines the Hospital's contention that the instant action will have far-reaching impact on the public health and welfare. This Act provides a clear statement of the extent to which Congress intends staff privilege decisions to be exempt from the antitrust laws. The decision made by the Hospital in the instant case is not one of them. Even assuming a nexus between the application of antitrust laws and the quality of medical care, there is no need here, in light of this Congressional action, to consider whether the need for unfettered staff privilege decisions outweighs the national policy of competition.

Conclusion

The decisions of this Court and all federal Courts of Appeals are in harmony with the decision of the Court of Appeals for the Third Circuit on the issue involved herein. Moreover, no special circumstances exist in the case at bar as would warrant further consideration by this Court of the issues presented regarding antitrust immunity for medical care providers. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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